92-872

No. _____

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In The

Supreme Court of the United States

October Term, 1992

IBRAHIM FEZ GHASSAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS P. ADAMS
419 Gravier Street
New Orleans, Louisiana 70130
Telephone (504) 523-3803

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Deportability, even where based on a serious drug-trafficking crime, may be waived under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. Sect. 1182(c) (hereinafter "section 212(c)"), for aliens with seven or more years of legal permanent resident status. Adjudication of the waiver claim requires discretionary balancing of the seriousness of the crime (plus any other negative factors if present) versus positive equities, principally rehabilitation and ties to family members in the U.S. who would suffer due to the threatened deportation. The administrative waiver decision is subject to an "abuse of discretion" standard of judicial review.

The questions presented are:

1) Whether, in contrast to cases arising under any other immigration statute, a claimant to relief under section 212(c) is statutorily barred from administrative reopening for consideration of material new evidence, an issue on which the courts of appeal are in direct conflict.

2) Whether, in adjudicating discretionary deportation relief claims, prior caselaw holding U. S. marriage equities discountable if acquired at a readily definable point – as after an administrative deportation order, or while the alien spouse is in illegal status – should now and for the first time be abandoned in favor of discounting such equities whenever the U. S. spouse is deemed to have married with foreknowledge that the alien spouse could one day be deported.

QUESTIONS PRESENTED – Continued

3) Whether an Immigration Judge's finding of rehabilitation based on substantial evidence may be overturned on administrative appeal, absent any legal error or contrary evidence.

4) Whether the "abuse of discretion" judicial review standard should be applied less deferentially under section 212(c) than in cases involving other types of discretionary deportation relief, an issue as to which different panels of the Fifth Circuit are in conflict, and which the Fifth Circuit has refused to resolve en banc.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Ibrahim Fez Ghassan, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgments of the United States Court of Appeals for the Fifth Circuit entered in this matter on September 8, 1992.

OPINIONS AND JUDGMENTS BELOW

The decision and order of the Immigration Judge, filed March 27, 1990, are reprinted in the Appendix to

this Petition at pages App. 1 through App. 4. The decision and order of the Board of Immigration Appeals, filed July 12, 1991, are reprinted in the Appendix at pages App. 5 through App. 22. The decision and order of the Board of Immigration Appeals, filed February 3, 1992, are reprinted in the Appendix at pages App. 23 through App. 33. The opinion and judgments of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on September 8, 1992, reported at 972 F.2d 631 (5th Cir. 1992), are reprinted in the Appendix at pages App. 34 through App. 53. The per curiam order of the United States Court of Appeals for the Fifth Circuit, entered on October 8, 1992, reported at ___ F.2d ___ (5th Cir. 1992), is reprinted in the Appendix at pages App. 54 through 55.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 8, 1992, affirming the Board of Immigration Appeals' decisions dated July 12, 1991, and February 3, 1992. The Court of Appeals denied a timely petition for rehearing on October 8, 1992. The jurisdiction of this court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 20.1.

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code and the Code of Federal Regulations:

Title 8 U.S.C. Section 1182(c)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Title 8 CFR Section 3.2

The Board [of Immigration Appeals] may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was

fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in Sect. 3.1(b)(1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Ibrahim Ghassan herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on his two consolidated Petitions for Review, each taken from an administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction in each case was invoked under 8 U.S.C. Sect. 1105a(a), which establishes the exclusive procedure for judicial review of such administrative decisions.

II. Statement of Facts

Mr. Ghassan is a native and citizen of Lebanon, who came to the U.S. as a nonimmigrant student in 1978. He gained U.S. legal permanent resident status in 1981, through his mother's petition. In 1980 he met Donna Ghassan, his U.S. citizen wife, in Minnesota. They were lovers for two years, until Mrs. Ghassan moved to North Carolina with her parents.

In 1983, when Mr. Ghassan was teaching physics at Mankato State University, where he had earned a physics degree, his brother Georges persuaded him to join a heroin importation scheme. A.R. 195-96.[1] His involvement was unwitting at first, and he never played a central role in Georges' enterprise. A.R. 174-75; 391. He was convicted in 1984, upon pleading guilty to a charge of conspiracy to import controlled substances. Mr. Ghassan served about four and one-half years in prison; Georges, being unlike Mr. Ghassan ineligible for relief under U.S. immigration laws, was deported.

Since completing his prison term in April, 1989 and up to the present time, Mr. Ghassan has been free on an immigration bond, and has complied with all probation requirements. Other than his single conviction, he has no criminal record whatsoever. He admitted his crime to the Immigration Judge ("IJ"). A.R. 177-78; 201-02. He showed remorse. A.R. 231. Mr. Ghassan received numerous

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[1] The abbreviation "A.R.," followed by a number or numbers, refers to the certified administrative record filed with the Court of Appeals for the Fifth Circuit in Case No. 92-4177.

awards for initiative and hard work as an inmate, using his prison time to learn and help others learn automotive mechanics. A.R. 180-82. After his release, he rose to the top of his new profession in record time: he is now one of only a few Oldsmobile Master Automobile Mechanics in the U.S., a position of great responsibility paying well over fifty thousand dollars per annum. A.R. 28-29. He does not drink or use drugs. A.R. 20; 222.

In 1988, while Mr. Ghassan was still in prison, Mrs. Ghassan reinitiated contact. A.R. 182-84; 215-16. She had married and given birth to a son, but had separated from her husband because he was abusive and had beaten her, to the extent that she was eventually hospitalized. A.R. 22-24; 217-18; 282-84. Mr. and Mrs. Ghassan's romance quickly rekindled, and she divorced her first husband. A.R. 22-24; 278-89. Mr. and Mrs. Ghassan married on September 23, 1989. She knew at the time that he might someday be deported because of his criminal conviction; she had become completely dependent upon his love and support, however, as had her son. A.R. 22-27; 218-20.

Mrs. Ghassan and her family credit Mr. Ghassan with having rescued her and her son at a critical lowpoint, as she was trying to escape a traumatically abusive relationship, and her son badly needed a loving father figure. A.R. 22-27; 38; 217-24; 247. If Mr. Ghassan were deported to Lebanon, Mrs. Ghassan and her son would be unable to accompany him due to governmental travel restrictions (*see* 57 Fed. Reg. 5925 (Feb. 18, 1992) (extending longtime travel ban as "Lebanon continues to be an area ' . . . where there is imminent danger to the public health or the physical safety of United States travelers' ")). The resultant breakup of the family would be devastating for

Mrs. Ghassan and her son, given their love for Mr. Ghassan and their dependence on him. A.R. 217-24; 238; 249. They would also suffer extreme financial hardship, as he would be unable to continue to support them from Lebanon. A.R. 220.

III. Proceedings Below

Mr. Ghassan conceded deportability before the IJ, and asked for a waiver thereof under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. Sect. 1182(c) (hereinafter "section 212(c)"). In support of the waiver application, voluminous and compelling evidence was introduced of his rehabilitation and good character, and of the hardships he and his family would suffer should he be deported. A.R. 305-88. In a decision dated March 27, 1990, the IJ held that Mr. Ghassan had "clearly establish[ed] genuine rehabilitation," and that his relief claim was "very appealing." The IJ found Mr. Ghassan's family equities undercut, however, by the fact that Mrs. Ghassan knew at the time of their marriage that he could eventually be deported. The IJ's decision also focused on the fact that Mr. Ghassan served over half of his eight-year sentence, "some two years more than one would expect." The waiver was denied, as Mr. Ghassan's positive equities were deemed outweighed by his crime under the circumstances. The IJ ordered deportation to Lebanon.

The BIA dismissed Mr. Ghassan's administrative appeal on July 12, 1991. It held that the IJ's reliance on the proportion of the prison term actually served was erroneous, and conceded that compelling positive equities had been proven. Like the IJ, however, it found Mrs.

Ghassan's hardships diminished by her foreknowledge of possible deportation. It declared itself "unconvinced" of Mr. Ghassan's rehabilitation, moreover, conjecturing that he might some day "succumb again to his family's pressure and the temptation of the large profits to be had in [drug-trafficking] activities." It acknowledged the compelling further proofs of rehabilitation and hardship filed during the pendency of the appeal (*see* A.R. 106-14), but did not state what weight – if any – it assigned to this evidence.

Mr. Ghassan petitioned the Fifth Circuit (in Case No. 91-4664) for review of the BIA's decision, and subsequently filed a motion to reopen with the BIA, seeking to submit the virtually incontrovertible further proof of rehabilitation that had accrued since the BIA's dismissal of his appeal. A.R. 20-63. The BIA denied the motion on February 3, 1992, citing its intervening decision in *Matter of Cerna*, Interim Dec. No. 3161 (BIA 1991) (motion to reopen adjudication of relief claim legal equivalent of new relief application; current eligibility for relief therefore necessary; legal permanent resident status required under section 212(c), but terminates upon BIA's dismissal of administrative appeal; reopening therefore statutorily barred). A second petition was then filed in the Fifth Circuit (in Case No. 92-4177), seeking review of the reopening denial; as required under 8 U.S.C. Sect. 1105a(a)(6), the two petitions were consolidated.

In his pleadings and oral argument to the Fifth Circuit, Mr. Ghassan's counsel took the following positions *inter alia:* that the denial of reopening under *Cerna*, while supported by a Ninth Circuit precedent in *Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990), was wrong as a matter of

law, and that the court should adopt the Second Circuit's better-reasoned contrary holding in *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991) (reopening motion *not* equivalent to new relief application; current eligibility for relief therefore not required); that the BIA erred in finding no rehabilitation, in the absence of any supporting record evidence and despite the IJ's emphatic record-based ruling to the contrary; and that the scanting of Mr. Ghassan's marriage equities was unfair and contrary to applicable caselaw. Counsel also noted binding precedent applying the "abuse of discretion" standard of judicial review with particular deference to BIA decisions under relief provisions deemed to present special reasons for such restraint, citing *INS v. Abudu*, 485 U.S. 94 (1988) (review of reopening denial under 8 CFR Sects. 3.2 and 208.11 restricted due to "strong public interest in bringing litigation to a close"), as well as *Hernandez-Cordero v. INS*, 819 F.2d 558, 562 (5th Cir. 1987) (specific language of relief statute calls for limited review), and *Osuchukwu v. INS*, 744 F.2d 1136, 1139-40 (5th Cir. 1984) (same). Counsel argued that relatively *less* deference is due the BIA in cases arising under statutes that do *not* present similar grounds for restricted judicial review; that section 212(c) is such a statute; and that a nondeferential standard of review should therefore be applied in the present case.

Counsel argued further that the Fifth Circuit had in fact just adopted a nondeferential review standard under section 212(c), in *Diaz-Resendez v. INS*, 960 F.2d 493, 495 (5th Cir. 1992),[2] where it stated that it "engage[s] in a

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[2] *Diaz-Resendez* was decided after submission of briefs to the Fifth Circuit in the present case. Counsel referred the court

substantial inquiry, . . . a thorough, probing, in-depth review," and "does not rubber stamp agency decisions; instead review must be searching and careful." Under *Diaz-Resendez*, the BIA's decision must be overturned:

> [if] there are persuasive indicators that the [BIA] erred [. . . ; or if the decision] is arbitrary, irrational, or contrary to the law [. . . ,] inexplicably departs from established policies [. . . , or] fails to address meaningfully all material factors extant [. . . or] give "reasons for denying relief that reflect full consideration of the evidence."

Id. The court was urged to follow the nondeferential approach taken in this binding precedent decision.

The Fifth Circuit rejected each of these arguments, and affirmed the BIA on September 8, 1992. It agreed that administrative reopening is statutorily barred in section 212(c) cases, while noting the conflict in the circuits. It held further that the administrative finding of lack of rehabilitation was not an abuse of discretion, even though admittedly "the BIA did not refer to any specific evidence," since the BIA's decision need only "reflect that 'it has heard and thought and not merely reacted' " (quoting *Luciano-Vincente v. INS*, 786 F.2d 706, 708-09 (5th Cir. 1986), in turn quoting *Osuchukwu*, 744 F.2d at 1142-43 (5th Cir. 1984)).

The court found it significant that "nothing in the record shows that [Mr. Ghassan's] brother is no longer involved in criminal activity, nor is there evidence that

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to *Diaz-Resendez* in a letter dated June 2, 1992, and discussed the case extensively at oral argument.

Ghassan has become immune to his brother's blandishments or has broken off contact with him" (referring to Mr. Ghassan's by-then-deported[3] brother Georges); it was further stated that "nothing reveals how Ghassan would cope with financial hardship." As support for its insistence that Mr. Ghassan answer for or disprove further misconduct by his brother, the court cited *Nunez-Pena v. INS*, 956 F.2d 223, 226 (10th Cir. 1992) (discounting claimed section 212(c) family equities where family members in question had participated in very crime upon which deportability based).

In upholding the BIA's scanting of Mr. Ghassan's family hardship equities because of their foreseeability, the Fifth Circuit cited only to *Matter of Correa*, 19 I&N Dec. 130, 134 (BIA 1984), which by the court's own admission "applies only to equities acquired after a final order of deportation." It was concluded, however, that "[t]he factors the BIA considers are equities, matters of fairness," and that "[c]onsidering [Mrs. Ghassan's] previous knowledge seems eminently equitable."

As to the various arguments presented as calling for nondeferential judicial review, the court stated that "[a]lthough Ghassan questions the standard of review we apply to BIA decisions on section 212(c) applications, we recently made plain that we look for abuse of discretion," and cited *Diaz-Resendez*. Much of the relevant language from that case (as set forth above) was duly quoted, but

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[3] Note was made at Mr. Ghassan's deportation hearing of March 20, 1990, that Georges had by then been deported. A.R. 175.

the least deferential formulations – e.g., "[review is] thorough, probing, in-depth," etc. – were omitted. The court concluded that "in light of the well established public policy against drug trafficking, we cannot say that the BIA abused its discretion in mandating Ghassan's deportation."

On September 22, 1992, a petition for rehearing was filed in the Fifth Circuit on Mr. Ghassan's behalf. En banc reconsideration was suggested, given the split in the circuits on the issue of statutory eligibility for reopening, and also because of the court's radical departure from prior caselaw holding family equities discountable only where they accrue at some readily definable point, as after a final deportation order (*Correa*), or while the claimant is in illegal immigration status (*Faddah v. INS*, 553 F.2d 491, 496 (5th Cir. 1977) (cited in *Correa*, 19 I&N Dec. at 134)). En banc treatment was particularly urged, moreover, because of conflicting decisions within the Fifth Circuit on the standard of review issue: not only had the court failed in the present case to apply the nondeferential standard required under *Diaz-Resendez*, but an intervening decision by yet another panel had taken an even more restrictive approach, holding judicial review virtually unavailable, since "section 212(c) does not provide for standards governing how the [BIA's] discretion should be exercised." *Ashby v. INS*, 961 F.2d 555, 557 (5th Cir. 1992) (citing *Perales v. Casillas*, 903 F.2d 1043 (5th Cir. 1990)).

The Fifth Circuit denied both the rehearing petition and the en banc suggestion, without discussion, in an order dated October 8, 1992.

REASONS FOR GRANTING THE WRIT

Section 212(c) cases are of special national significance generally, given the compelling public policies involved. Anti-drug trafficking policy is implicated, as the statute provides the *only* deportation waiver for such offenses. Section 212(c) also reflects a contrasting, and in its own right compelling, "policy of reuniting families." *Matter of Anwo*, 16 I&N Dec. 293, 296 (BIA 1977) (citing *Francis v. INS*, 532 F.2d 268 (2nd Cir. 1976) and *Tim Lok v. INS*, 548 F.2d 37 (2nd Cir. 1977)). It can forgive even very serious drug crimes, recognizing that deportation of long-time legal permanent residents can be excessively harsh where rehabilitation is shown, and especially where innocent family members will suffer.

The Fifth Circuit plays a critical role in section 212(c) cases, as it has jurisdiction over the alien detention facility in Oakdale, Louisiana. Pursuant to a recent agreement between the Immigration and Naturalization Service and the Bureau of Prisons, virtually all federal prisoners nationwide who are subject to deportation on criminal grounds are transferred toward the end of their sentences to Oakdale, where deportation proceedings are commenced (as occurred in the present case). *See* IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT. OF JUSTICE, IMMIGRATION ACT OF 1990 REPORT ON CRIMINAL ALIENS (1992) (App. 56-91) (*see especially* App. 65-66). Section 212(c) provides the principle – often the exclusive – relief from deportation in these criminal cases. Since under 8 U.S.C. Sect. 1105a(a)(2), venue for judicial review lies in the circuit where deportation proceedings were conducted (as well as in the circuit where the individual resides), the Fifth Circuit will necessarily handle a disproportionate number

of section 212(c) cases as such cases percolate up to the federal appellate level.

In particular, Ibrahim Ghassan's writ of certiorari should be granted because of the split in the circuits on the issue of statutory eligibility for reopening in section 212(c) cases. The positions taken by the Second Circuit in *Vargas*, on the one hand, and by the Ninth and now Fifth Circuits on the other hand, in *Gonzales* and in the present case, are directly and irreconcilably opposed. All three cases were decided between 1990 and 1992, and *Vargas* and the Fifth Circuit in the present case cite and reject their respective contrary precedent. *Vargas*, 938 F.2d at 363-64 (citing *Gonzales*); *Ghassan*, 972 F.2d at 638 n.10 (App. 47) (citing *Vargas*). This issue will not resolve itself without Supreme Court intervention.

The issue is important: the right to urge material evidence that was previously unavailable would seem fundamental to the concept of a fair hearing, as the Attorney General apparently recognized in providing that the BIA may reopen "*any* case in which it has rendered a decision." 8 CFR Sect. 3.2 (emphasis supplied). To single out section 212(c) cases as the sole exception to this rule raises procedural due process and equal protection concerns, particularly as claimants to section 212(c) relief are necessarily longtime legal permanent residents, who by virtue of such status are entitled to greater constitutional protections. *Landon v. Plascencia*, 459 U.S. 21, 32 (1982); *Rosenberg v. Fleuti*, 374 U.S. 449, 458 (1963). The issue of reopening inevitably also implicates public interest in avoiding dilatory tactics and in bringing litigation to a close (*see, e.g., Abudu*, 485 U.S. at 107); it is suggested

herein (see below), however, that this concern has been overstated in the context of deportation proceedings.

Certiorari is also merited in the present case because of the Fifth Circuit's radical and unprecedented extension of the doctrine of discountable foreseen hardship equities. The court relied on *Correa,* which specifically held that "equities which are acquired after a final order of deportation has been issued against an alien are entitled to less weight than those acquired before an alien has been found deportable." 19 I&N Dec. at 134 (citations omitted). The logical corollary is that equities accruing *before* any deportability finding, as in the present case, are *not* to be scanted. The court not only miscited *Correa*: it completely rejected the "bright-line" approach of the BIA therein, in favor of discounting hardships whenever deemed foreseen. This would presumably include those acquired before deportation proceedings even commence, as where the U.S. spouse knows that the alien spouse has committed an act that, if ever detected, could lead to deportation. In this regard should be borne in mind the sheer number of possible deportable acts under the many complicated and stringent U.S. immigration provisions, and in some instances the relatively innocuous nature of such "offenses" (e.g., where a nonimmigrant student fails for one semester to carry a full load of courses – *see* 8 U.S.C. Sect. 1101(a)(15)(F)(i) and 8 CFR Sect. 214.2 (f)(6)). The *likelihood* of eventual deportation (including the odds against obtaining discretionary relief), as viewed from the time the hardship equity arises, would seemingly have to be considered as well in adjudging the foreseeability of the hardship. And even those hardships which *should* have been foreseen, but were not, could become fair game

as "constructively foreseen." The Fifth Circuit's approach on this issue creates an unfair and unworkable "slippery slope" down which many deserving deportation relief claims will be lost, particularly as this holding applies equally to hardship-based claims under other important relief statutes (e.g., 8 U.S.C. Sect. 1182(e) (waiver of foreign residency requirement for exchange visitors); 8 U.S.C. Sect. 1182(h) (waiver of certain grounds of deportability); and 8 U.S.C. Sect. 1254(a) ("suspension of deportation" for longtime residents)).

The subject of Mr. Ghassan's rehabilitation should also be reviewed on certiorari, since an important question was raised regarding whether deference is owed the IJ by the BIA on this key issue. While the BIA regularly proclaims its "de novo" review power over IJ findings, its own caselaw requires that it normally defer to the IJ's ruling on credibility. *See, e.g., Matter of Godfrey,* 13 I&N Dec. 790, 791 (BIA 1971). Because the issue of rehabilitation turns on related considerations, the BIA should give similar deference to the IJ's findings thereon, particularly where, as here, there is no record evidence to the contrary.

Finally, Supreme Court guidance is needed on the issue of what deference the courts should accord BIA decisions under section 212(c), since various precedent decisions, particularly among different panels of the Fifth Circuit, have reached widely different results on this question. As noted above, in its first direct holding on this issue in a section 212(c) case, the Fifth Circuit stated, amidst other similarly nondeferential language, that its review is "thorough, probing, [and] in-depth." *Diaz-Resendez,* 960 F.2d at 495 (quoting *Citizens to Preserve*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). The panel in the present case nodded to *Diaz-Resendez*, but failed to recite the passage just quoted, as well as other especially nondeferential passages (see *Ghassan* at 635 (App. 39)), and went on to state that the BIA need only show that " 'it has heard and thought and not merely reacted' " (*Ghassan* at 636 (App. 42) (citations omitted)), a much more forgiving formulation. And in an intervening decision the Fifth Circuit went even further, holding judicial review virtually precluded in cases arising under section 212(c). *Ashby*, 961 F.2d at 557. The Supreme Court has spoken to the review standard issue as to denials of reopening by the BIA, holding judicial review particularly restricted in such cases due to "strong public interest in bringing litigation to a close." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Similar guidance is needed here, especially since the Fifth Circuit explicitly refused in the present case to resolve its intracircuit conflict by en banc reconsideration. The Supreme Court may also wish to reconsider the propriety of applying the nominally monolithic "abuse of discretion" standard with varying deference in different cases. It is herein maintained, in any event, that the standard *should* vary, and that it should be applied with relatively *less* deference in section 212(c) cases (see below).

ARGUMENT

1. Statutory Eligibility for Administrative Reopening

In holding administrative reopening statutorily barred in the present case, the Fifth Circuit adopted the

BIA's position in *Cerna*: i.e., that claimants to section 212(c) relief are barred from reopening because they no longer have the required legal permanent resident status. *Ghassan* at 637-38 (App. 46-47). This logic only applies, however, in cases where an alien attempts a *first-time* relief application after the BIA has already dismissed his or her administrative appeal, as in *Abudu*. It does not extend to situations where, as in the present case, reopening is sought in order to ask for readjudication, based on new material evidence, of a *previously-filed* relief claim for which prima facie eligibility has *already* been established. *See Vargas*, 938 F.2d at 362.

The Fifth Circuit's holding in the present case rests upon a legal fiction: it treats a motion to reopen adjudication of a previously-filed claim to relief as the legal equivalent of a first-time relief application, even though no application form is filed and no fee paid.[4] The Supreme Court has criticized reliance on legal fictions in deportation cases, stating that in interpreting an immigration statute, "involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities." *Costello v. INS*, 376 U.S 120, 131 (1964). The Supreme Court has also stated that statutory schemes must be construed "so as to produce a symmetrical whole." *Federal Power Comm'n v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949) (citation omitted). Under 8 CFR Sect. 3.2, the BIA "may [. . .] reopen [. . .] *any* case in which it has rendered a

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[4] Application for a section 212(c) waiver requires submission of Immigration and Naturalization Service Form I-191, plus a ninety-dollar fee. *See* 8 CFR Sect. 103.7.

decision" (emphasis supplied); and indeed a previously-denied claim under any other deportation relief statute can be reopened by the BIA upon submission of adequate new evidence. The Fifth Circuit's holding, if not an outright violation of 8 CFR Sect. 3.2, at the very least constitutes an impermissibly asymmetrical exception to it under *Federal Power*. The present case is also an all-too-common example of refusal by the courts to obey the Supreme Court's injunction that ambiguities in deportation cases are to be interpreted in favor of the alien. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

Allowing reopening in section 212(c) cases would not injure the public's interest in bringing litigation to a close. *Cf. Abudu*, 485 U.S. at 107. The Ninth Circuit's holding in *Gonzales* was largely based on this public policy concern, with the court warning that "endless applications for waivers" would otherwise be filed. 921 F.2d at 240. As noted by the Second Circuit in *Vargas*, however, the filing of a motion to reopen with the BIA does not stay deportation. 938 F.2d at 363. An affirmative stay motion must be made, which the BIA is free to deny (as it did in the present case). The motion to reopen is deemed abandoned, moreover, once deportation is effected. *Id.* (citing 8 CFR Sect. 3.2). And under 8 U.S.C. Sect. 1105a(a)(6), judicial review of a reopening denial must be consolidated with review of the underlying deportation order, as it was in the present case. It is not surprising, then, that a 1991 government report to Congress found "no pattern of abuse" of motions to reopen in immigration proceedings. *See* U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S REPORT TO CONGRESS ON CONSOLIDATION OF REQUESTS FOR RELIEF FROM

DEPORTATION (undated), with Assistant Attorney General's cover letter dated May 31, 1991. (App. 92-98).

2. Discounting Foreseen Hardships

The *Correa* doctrine, which discounts family and other hardship equities arising after a deportation order because they are foreseeable, is of questionable fairness to begin with. The hardship victim (e.g., a U.S. citizen spouse) is after all rarely in a position to avoid or mitigate the loss, and feels it just as keenly as if it were not foreseen. As one court noted, "sincere attraction is a feeling which may not simply be turned on and off." *Yu v. Marshall,* 312 F.Supp. 229, 233 (S. D. Tex. 1970) (refusing to discount foreseen equities in context of waiver under 8 U.S.C. Sect. 1182(e)). As in the present case, marriage in the face of possible travails merely underscores the deepness of the underlying commitment.

As noted above, *Correa* is clearly inapplicable to the present case in any event, since the IJ had not even made a preliminary determination of Mr. Ghassan's deportability, let alone deciding his claim to a waiver thereof, as of the time the Ghassans married. Research discloses *no* precedent (nor was any cited save *Correa*) for the Fifth Circuit's assertion that hardship equities must now be scanted whenever they are deemed foreseeable. This approach is unworkable, as argued above, and threatens to undermine many otherwise valid claims under various deportation relief statutes. The *Correa* doctrine, while harsh, is at least contained within "bright-line" boundaries, and should be limited thereto.

A different approach was taken in *Faddah v. INS*, 553 F.2d 491, 496 (5th Cir. 1977) (cited in *Correa*, 19 I&N Dec. at 134), which discounted equities arising while an alien is in illegal immigration status. This harsh rule, like that of *Correa*, is at least of limited and readily determinable applicability. In any event *Faddah*, like *Correa*, does not apply to the present case, since Mr. Ghassan continued in legal permanent resident status until the BIA dismissed his appeal, almost two years after his marriage. *See Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987).

The court's reference to "equities, matters of fairness" (*Ghassan* at 635 (App. 40)), was apparently an invocation of the term "equity" as it is understood to relate to a system of adjudication based on general ideas of fairness rather than rigid rules of law. *See* BLACK'S LAW DICTIONARY 540 (6th ed. 1990). While this concept is useful in regulating the dealings of "men with men" (*id.*) (e.g., in contract or property disputes), however, it should not be employed here as a tool to facilitate deportation and the sundering of a family. This would violate the spirit of *Fong Haw Tan* (recognizing the harshness of deportation and the relative vulnerability of an alien placed by the government in deportation proceedings), as well as its explicit holding (requiring construction of ambiguities in alien's favor). 333 U.S. at 10.

3. Rehabilitation

As argued above, the BIA (and by extension the Fifth Circuit) should have deferred to the IJ's emphatic finding of rehabilitation. As on the issue of credibility, the IJ is in the best position to look the individual in the eye and

discern whether he or she can be trusted. Instead, an impossible burden of proof was imposed on this issue, requiring *inter alia* that Mr. Ghassan prove his deported brother's rehabilitation in order to prove his own. The court cited *Nunez-Pena v. INS*, 956 F.2d 223, 226 (10th Cir. 1992) for the proposition that "involvement of members of a petitioner's family may be a negative factor in these proceedings." *Ghassan* at 636 n.7 (App. 43). As noted, however, the very family members Mr. Nunez-Pena claimed as section 212(c) equities had abetted his crime, and his case is therefore inapposite. More on point is another decision holding "fundamental" the notion that one should be punished for one's own misdeeds, but not those of family members. *Jen Hung Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986).

The court also demanded the impossible in requiring "negative proofs": i.e., that Mr. Ghassan prove that he "has become immune to his brother's blandishments or has broken off contact with him," and that he "reveal[] how [he] would cope with financial hardship." *Ghassan* at 636 (App. 42-43). This last requirement is particularly mystifying, since Mr. Ghassan was well-settled even at the time of the IJ's decision into a lucrative and honorable profession.

4. Standard of Judicial Review

Although judicial review of discretionary administrative decisions is almost invariably described as governed by the "abuse of discretion" standard, that standard is applied with varying degrees of deference in different types of cases. The Supreme Court and other courts have

explicitly narrowed the standard in cases where the underlying statutory or regulatory scheme is deemed to call for greater deference. In the immigration context, as noted above, it has been held that judicial review is particularly limited over BIA denials of reopening (*Abudu*), suspension of deportation (*Hernandez-Cordero*), and 8 U.S.C. Sect. 1182(h) waivers (*Osuchukwu*), *inter alia*.

The courts generally provide careful justification for restricting review in such cases, since the result can be affirmance of very harsh administrative decisions. For example, in *Abudu*, the Supreme Court invoked public policy aversion to prolonged litigation. 485 U.S. at 107. *Hernandez-Cordero* focused on the language of 8 U.S.C. Sect. 1254(a), which conditions suspension of deportation upon proof of "extreme" hardship, to be determined "in the opinion of the Attorney General [i.e., the BIA]," thus "doubly insulat[ing]" the BIA's decision from judicial review. 819 F.2d at 562. And since "extreme" hardship is also required under 8 U.S.C. Sect. 1182(h), a similarly restrictive approach was deemed appropriate in cases arising under that statute in *Osuchukwu*, 744 F.2d at 1139-40.

A logical corollary to these holdings is that a *less* deferential review standard should apply in cases arising under provisions that do not suggest similar justifications for judicial restraint. Another is that the restrictive approach taken in, e.g., a suspension of deportation case, should not be adopted in a case involving a different form of relief without analysis of whether the two relief schemes present similar grounds for deference. Accordingly, the Fifth Circuit was urged in the present case to apply a less restrictive standard than those used in

Abudu, Hernandez-Cordero, and *Osuchukwu,* as the concerns voiced in those cases do not apply here, and particularly as section 212(c) cases necessarily involve legal permanent residents entitled to special protections. *See Etuk v. Slattery,* 936 F.2d 1433, 1443-44 (2nd Cir. 1991) ("[w]hile we think [INS] still enjoys discretion when dealing with [legal permanent residents], we believe that the exercise of the discretion is subject to more intense scrutiny").

As noted above, the Fifth Circuit came out with two separate, widely variant holdings on this issue during the interval between submission of the briefs and the court's decision in the present case. *Diaz-Resendez* constituted a ringing endorsement of all the arguments urged on Mr. Ghassan's behalf in favor of nondeferential review. The Fifth Circuit took an extremely different approach in a decision filed only a few days later, however, in *Ashby v. INS,* 961 F.2d 555 (5th Cir. 1992).

Ashby relied on *Perales v. Casillas,* wherein the court, in reviewing a denial of employment authorization by the Immigration and Naturalization Service, held the "abuse of discretion" standard insusceptible of application, since the governing relief provision (8 CFR Sect. 274a.12) provides no guidance as to how the Service's discretion is to be exercised. *Perales,* 903 F.2d at 1051. *Perales* is readily distinguishable from section 212(c) cases, however, because it concerned a *nonstatutory* relief provision, and because caselaw *has* provided extensive guidelines for adjudication of section 212(c) claims. *See Ghassan* at 634 (App. 37). *Perales* itself differentiates, moreover, between "administrative adjudicatory decisions" (such as BIA and

IJ decisions) and "general administrative decision-making practices" (e.g., employment authorization determinations by the Immigration and Naturalization Service). 903 F.2d at 1051. *Perales* is, in any event, in the opinion of the leading treatise, an aberration from the "consistent recognition of a right to review immigration determinations." 3 C. GORDON AND S. MAILMAN, IMMIGRATION LAW AND PROCEDURE, Sect. 81.01[2] (rev. ed. 1992). *Ashby* erred in extending *Perales* to the section 212(c) context, and the court correctly refused to follow suit in the present case.

The court did not follow the binding precedent of *Diaz-Resendez* either, however, nor did it address the arguments advanced on Mr. Ghassan's behalf; it stated instead simply that "[a]lthough Ghassan questions the standard of review we apply to BIA decisions, we recently made it clear that we look for abuse of discretion." *Ghassan* at 634 (App. 39) (citing *Diaz-Resendez*). And despite its brief nod to *Diaz-Resendez*, it went on to apply without analysis a much more deferential review formulation (BIA must have "heard and thought and not merely reacted") taken from *Luciano-Vincente v. INS*, 786 F.2d 706 (5th Cir. 1986), a suspension of deportation case, and *Osuchukwu*, which involved appeal of a BIA refusal to reconsider a waiver denial under 8 U.S.C. Sect. 212(h). *Ghassan* at 636 (App. 42). No explicit rationale was advanced for taking a similarly restrictive approach under section 212(c). The language of the opinion makes it fairly plain, however, that the court's implicit holding is that greater deference is due the BIA in a case involving a *drug offense*, due to the national interest in fighting

drug traffickers. The court said as much in its final paragraph: *"[. . .] in light of the well established public policy against drug trafficking,* we cannot say that the BIA abused its discretion [. . . .]" *Ghassan* at 639 (App. 49). Pointed reference was also made to cases emphasizing the evils of the drug trade. *Id.* at 636 n.8 (App. 43-44).

While the court's antipathy toward drug trafficking is certainly well-founded, it erred in basing its holding regarding the review standard issue on this point. As noted above, Congress enacted section 212(c) as a means of balancing this concern against its interest in keeping families together. *Matter of Anwo,* 16 I&N Dec. at 296. The seriousness of the underlying crime is a prime factor in the adjudication of a section 212(c) waiver, in any event (i.e., the graver the crime, the greater the burden of proving offsetting positive equities). Serious offenses, including most drug crimes, can be forgiven only upon a showing of "unusual or outstanding equities." *Matter of Buscemi,* 19 I&N Dec. 628, 633 (BIA 1988). Anti-drug policy is thus already "factored into" the BIA's decisions under section 212(c); there is no reason to invoke it again regarding the standard of judicial review.

The rationales advanced for greater judicial deference in *Abudu, Hernandez-Cordero,* and *Osuchukwu* were founded on considerations of judicial economy and Congressional intent. In the present case, by contrast, a category of disfavored individuals is singled out, and denied normal process because such individuals are disfavored. This is analogous to saying, in a criminal case, that a close call by a lower court on a significant upward departure from the sentencing guidelines will be subjected to less scrutiny if a drug crime is involved. The court's approach

is irrational, and threatens to frustrate meaningful review of BIA decisions in section 212(c) cases.

CONCLUSION

For the reasons set forth hereinabove, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THOMAS P. ADAMS
419 Gravier Street
New Orleans, Louisiana 70130
Telephone (504) 523-3803

Attorney of record for Petitioner
Ibrahim Fez Ghassan

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE IMMIGRATION JUDGE
ATLANTA, GEORGIA

In the Matter of	)	
	)	
Ibrahim Fez Ghassan	)	IN DEPORTATION
A 24 447 284	)	PROCEEDINGS
Respondent	)	

The respondent is a native and citizen of Lebanon who became a lawful permanent resident on September 25, 1981. On September 17, 1984 he was convicted in the United States District Court in Minnesota for Conspiracy to Import and Distribute Heroin. These facts are based upon admissions made by the respondent and establish his deportability under section 241(a)(11) of the Act.

As relief from deportation the respondent has requested a waiver under section 212(c) of the Act.[1] The Board of Immigration Appeals in *Matter of Marin*, 16 I&N 581 (BIA 1978), set out factors to be considered in determining whether the alien merits this relief. Favorable factors include family ties within the United States, residence of long duration, evidence of hardship to the alien and his family if deportation occurs, employment history, the existence of property or business ties, service to the community, and evidence of genuine rehabilitation. Adverse factors include the nature and underlying circumstances of the exclusion ground to include its nature,

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[1] The respondent originally also requested to be considered for asylum, but has withdrawn that application.

recentness, and seriousness. Moreover, one or more of these adverse factors may ultimately be determinative of whether section 212(c) relief is granted.

In *Matter of Buscemi*, I.D. 3058 (BIA 1988), the Board held that as the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. Such a heighten[ed] showing is required when an alien has been convicted of a serious crime, such as the one for which the alien has been convicted. Further, an alien who demonstrates unusual or outstanding equities merely satisfies the threshold test for having a favorable exercise of discretion considered and does not compel its exercise in their [sic] favor.

The respondent has been a permanent resident for eight years preceding his application.[2] The respondent is married to a United States Citizen and has one USC stepchild. Prior to his conviction, he was teaching at Mankato State University in Minnesota where he had obtained his degrees in physics. Soon after entering prison he became actively involved in the work program in mechanics and received numerous awards for his initiative and hard work. Since his release from prison he has worked as a

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[2] The Service argues that the respondent's trip to Switzerland in 1983 could not be considered casual or innocent because it was part of the scheme to import heroin. Therefore, it asserts that lawful domicile ended in 1983 and the respondent cannot be granted a waiver under section 212(c). The Board of Immigration Appeals in *Matter of Duarte*, 18 I&N 329 (BIA 1982), held that the domicile of one who retains LPR status must be considered lawful.

mechanic and has progressed rapidly in the company. The respondent's actions since his conviction clearly establish genuine rehabilitation. The respondent has not been involved in community activities choosing instead to spend time with his new wife and child, and her large family. The respondent and his wife enjoy a good marriage and each other's company. Because of travel restrictions, neither the wife nor her child [can] accompany the respondent to Lebanon. The respondent has known his wife for approximately ten years, but the relationship broke off when her family moved to North Carolina. After a bad first marriage, the wife contacted the respondent while he was still in prison and he joined her when he was released. On July 17, 1989, the respondent was sent notice for his deportation hearing on November 1, 1989. On September 23, 1989, the respondent and his wife married.

The respondent has been a permanent resident for one year longer than the minimum needed to make the waiver application. He is married to a USC, but they married knowing of his potential for deportation. The respondent has presented a very appealing case showing genuine rehabilitation, but the nature and seriousness of his offense outweighs these equities. The respondent's crime is not one of impetuousness nor arising out of a drug dependence. Rather, it involved a well-planned international scheme to import and sell large quantities of heroin. The respondent was well-educated and employed during his criminal involvement. While this was his first offense, the trial judge sentenced him to eight years in prison, a long sentence for a first offender. (I note that his co-defendant Issa was to receive no more than six years.)

Further, even though he received numerous awards in prison, he was not released until he had served four and one-half years of his sentence, some two years more than one would expect. Considering the nature and seriousness of his offense, I would find that this one factor alone outweighs his equities and he has not met the threshold requirement for eligibility for the waiver he seeks.

ORDER: IT IS HEREBY ORDERED that the application for waiver under section 212(c) of the Act is DENIED.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Lebanon.

/s/ Charles E. Auslander, Jr.
Charles E. Auslander, Jr.
Immigration Judge

March 27, 1990

U.S. Department of Justice **Decision of the Board of Immigration Appeals**
Executive Office for Immigration and Review
Falls Church, Virginia 22041

File: A24 447 284 – Atlanta Date: JUL 12, 1991

In re: IBRAHIM FEZ GHASSAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Mark J. Newman, Esquire
Troutman, Sanders, Lockerman & Ashmore
127 Peachtree Street,
1400 Candler Bldg.
Atlanta, Georgia 30310-1810

ON BEHALF OF SERVICE: Terry C. Bird
District Counsel

ORAL ARGUMENT: April 30, 1991

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] –
Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility

This is an appeal from the decision of the immigration judge dated March 27, 1990, finding the respondent deportable as charged, denying his application for a waiver of inadmissibility under section 212(c) of the

Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(c), and ordering him deported from the United States to Lebanon. The request for oral argument was granted and oral argument was heard on April 30, 1991. *See* 8 C.F.R. § 3.1(e). The respondent's appeal will be dismissed.

The respondent is a 30-year-old native and citizen of Lebanon. He was first admitted into the United States in 1978 as a nonimmigrant student when he was 17 years old. He remained in student status until 1981, when he was admitted into the United States as a permanent resident on the basis of a petition filed by his father. On September 4, 1984, the respondent was convicted in the United States District Court for the District of Minnesota, Third Division, for conspiracy to import and distribute a Schedule I Narcotic Substance, namely heroin. He was sentenced to 8 years of imprisonment, and served 4 and a half years.

On March 16, 1989, the Immigration and Naturalization Service ("Service") issued an Order to Show Cause (Form I-221) against the respondent, charging that he was deportable from the United States under section 241(a)(11) of the Act as an alien convicted of violating a law relating to a controlled substance.

The respondent appeared at his deportation hearing with counsel, admitted as true the allegations contained in the Order to Show Cause, and conceded deportability as charged. The Service presented into evidence a court-certified copy of the respondent's conviction record. We therefore find that the respondent's deportability has been established by clear, unequivocal, and convincing

evidence as required by *Woodby v. INS*, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14(a).

The respondent applied for relief from deportation under section 212(c) of the Act. On March 20, 1990, after a hearing on the merits of the respondent's section 212(c) application, the immigration judge denied the respondent's application in the exercise of discretion. The respondent filed a timely appeal and filed a brief in support of the appeal. In response, the Service filed a memorandum stating that "the Service has reviewed the decision of the immigration judge and is in accord with his reasoning and conclusion in the case; therefore, the Service files this memorandum in lieu of submitting a brief." Memorandum Adopting The Decision Of The Immigration Judge. Both parties also presented their arguments at oral argument before this Board on April 30, 1991.

Counsel for the respondent has raised two allegations of procedural error which we shall address before turning to the merits of the application. First, the respondent claims that the immigration judge erred by excluding from evidence a letter from the respondent's brother. The brother was convicted as a co-conspirator in the crime underlying the charge of deportability in this case and was subsequently deported to Lebanon. In that letter, which the respondent has submitted on appeal, the respondent's brother tries to exculpate the respondent by claiming that the respondent pleaded guilty only as part of a "package deal," in an effort to reduce his brother's sentence. At the hearing, upon listening to a proffer regarding the letter, the immigration judge refused to admit the letter into evidence. The brother's letter is in

effect a collateral attack on the respondent's conviction. Neither the immigration judge nor this Board may entertain a collateral attack on a judgment of conviction unless that judgment is void on its face, and we cannot go behind the judicial record to determine the guilt or innocence of the alien. *See, e.g., Trench v. INS,* 783 F.2d 181 (10th Cir.), *cert. denied,* 479 U.S. 961 (1986); *Avila-Murrieta v. INS,* 762 F.2d 733 (9th Cir. 1985); *Zinnanti v. INS,* 651 F.2d 420 (5th Cir. 1981) (per curiam); *Chiaramonte v. INS,* 626 F.2d 1093 (2d Cir. 1980) (foreign conviction); *Longoria-Castenada v. INS,* 548 F.2d 233 (8th Cir.), *cert. denied,* 434 U.S. 853 (1977); *Aguilera-Enriquez v. INS,* 516 F.2d 565 (6th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976); *Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988). Accordingly, the immigration judge did not err in excluding the letter. Moreover, assuming arguendo that the letter should have been admitted, we find no prejudicial error here since the letter has no probative weight. The author is not available for cross-examination. He has every reason to write an exculpatory letter for his brother, and has little incentive not to manufacture whatever statements would be helpful, since he has already been prosecuted and deported. We therefore find no prejudice in the exclusion of the letter, and hence no reversible error.

Second, counsel claims that the immigration judge erred in speculating regarding the length of the respondent's sentence and time served in prison. We agree. The immigration judge states that "even though he received numerous awards in prison, he was not released until he had served four and one-half years of his sentence, some two years more that [sic] one would expect. Considering the nature and seriousness of his offense, I would find

that this one factor alone outweighs his equities and he has not met the threshold requirement for eligibility for the waiver he seeks." (i.j. decision at 3). The immigration judge offers no evidentiary basis for the statement that the respondent's time in prison was "some two years more than one would expect." Nor is this a matter of such general knowledge that official notice would be appropriate. Accordingly, we find this speculation to have been error. However, this Board is not bound by the findings of the immigration judge and may review the record de novo. *See Parcham v. INS*, 769 F.2d 1001, 1005 (4th Cir. 1985); *DeLucia v. INS*, 370 F.2d 305, 308 (7th Cir. 1966), *cert den.* 386 U.S. 912 (1967); *Goon Wing Wah v. INS*, 386 F.2d 292, 293-94 (1st Cir. 1967); *Chen v. Foley*, 385 F.2d 929, 935 (6th Cir. 1967), *cert. den.* 393 U.S. 838 (1968); *Tovar v. INS*, 368 F.2d 1006 (9th Cir. 1966), *cert. den.* 388 U.S. 915 (1967); *Matter of Villanova-Gonzales*, 13 I&N Dec. 399 (BIA 1969). We have done so here, and have arrived at our own evaluation of the merits of the request for a waiver under section 212(c) of the Act.

At the hearing, the respondent, his wife, his father-in-law, his mother-in-law and a friend of his wife testified. The respondent also submitted documentation in support of his application. Exhibits 4-10. The respondent claims that the people who wrote letters on his behalf were aware of his conviction (Tr. at 50-51). The Service submitted a certified copy of the conviction record.

The evidence and testimony in this case may be summarized as follows. The respondent first arrived in the United States in 1978 as a student. In 1980, while studying for his undergraduate degree in Physics, the respondent met and began dating Donna Owings, a

United States citizen.[1] They maintained a relationship for approximately 2 1/2 years, during which time the respondent joined in various family festivities and activities, such as holidays and fishing trips with Donna's father (Tr. at 14-16, 75; Exh. 8). Donna's family then moved out-of-state and the relationship ended.

In 1983, the respondent's brother came to the United States from Lebanon. He was one of the organizers of a scheme to import and distribute heroin in the United States. The record of conviction reflects that the respondent pleaded guilty to conspiracy to import and distribute heroin from Lebanon into the United States. According to the indictment, the respondent's role was to receive and sell and distribute the heroin in the United States. The indictment also states that the respondent took part in a number of overt acts in furtherance of the conspiracy, including the delivery and sale of a kilogram of heroin on one occasion and 200 grams of heroin on another. The indictment also states that the respondent travelled to Switzerland to engage in financial arrangements relating to the importation scheme.

In his testimony before the Court, the respondent claimed that he unwittingly became involved in this scheme, in that he assisted his brother in various acts which furthered the criminal scheme, such as driving him to and from various pickups and deliveries. The respondent claimed that he did not know the nature of his brother's activities until the arrest by Federal agents was

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[1] In the interest of clarity, we shall occasionally refer to the respondent's wife as "Donna." This is the name by which she is generally referred to in the record.

imminent (Tr. at 37, 38). On the other hand, he did answer affirmatively when asked on cross-examination if he was guilty of the crime to which he pleaded guilty (Tr. at 19-20, 44). The respondent claimed not to feel bitter about his conviction but rather said he felt bad and tried to learn from his conviction (Tr. at 21). He also expressed remorse that he had not stopped the criminal activity when he realized what was going on, but that he had not done so because he was afraid the people following him (the FBI) would kill him, and because of his relationship to his brother (Tr. at 96). He further claimed to feel remorse when he entered prison and saw what drugs had done to the lives of the people he saw there (Tr. at 97). The respondent's wife testified that the respondent expresses remorse that it was his own brother whom he had so misjudged (Tr. at 72-73).

While in prison, the respondent received a card from Donna, and the two resumed an active correspondence (Tr. at 24-26, 57; Exh. 8). Donna explained to the respondent that she had married another man by whom she had a son. However, her husband turned out to be abusive and he had beaten her on various occasions, to the extent that she eventually entered the hospital (Tr. at 54-55, 59-60, 85, 88-9; Exh. 9). Donna further explained that she sought out the respondent for advice as an old friend. She also had the thought in the back of her mind that perhaps a romance would develop again, since she felt perhaps she should have married the respondent to begin with (Tr. at 56, 61, 77, 85, 89). After 2 weeks of searching for him, Donna located the respondent, initiated a correspondence, and they soon resumed their courtship (Tr. at 56-58, 60-61). After the respondent's release, they were

married. The respondent claimed that he married for love, and not because he was in deportation proceedings (Tr. at 32-33). The respondent's wife, as well as the other witnesses, testified to the closeness of the respondent to his wife and his step-son, and to the hardship that the respondent, his wife, and her son would experience should he be deported. They further claim that because of her traumatic experiences with her first husband, because of the child's attachment to the respondent, and because of the ban on United States citizen travel to Lebanon, the separation would be particularly hard (Tr. at 35, 65-66, 80, 86-87, 91; Exh. 8).

According to the testimony of Donna, her parents, a friend, and letters from various other friends and family members, the respondent has developed a close relationship with his step-son (now just under 4 years old) (Tr. at 61-64, 79, 86, 90). The respondent's wife testified that her son's natural father takes little interest in him, and that the respondent has developed a close relationship with him, like a father and son, to the extent that her son calls the respondent Daddy and his natural father by his first name (Tr. at 61-64). Donna and her father testified that her former husband pays child support but that the respondent is the primary financial support of her son (Tr. at 62, 80).

The witnesses also testified that the respondent has developed close ties with his wife's family. Donna's father testified that beginning in 1980 the respondent became a friend of the family. As examples, he testified that he fished and hunted with the respondent and that the respondent went to Missouri to meet some of the extended family (Donna's father's family) (Tr. at 75). The

witnesses also testified that the respondent, at their invitation, stayed with them when he was released from prison and that they helped the respondent find work (Tr. at 78). Donna's family also raised the money to pay the $25,000 fine imposed on the respondent as part of his sentence (Tr. at 46).

While in prison, the respondent took various courses in auto mechanics, and became an assistant instructor of mechanics. Letters and certificates, Exh. 8. According to the progress reports and letters from prison officials, the respondent received outstanding ratings, resulting in his being granted an extra good time recommendation and extra responsibilities. The respondent submitted several letters testifying to the respondent's hard work and initiative and mentioning that his repairs of United States Forest Service vehicles saved the government several thousand dollars. Exh. 8.

After his release on April 26, 1989, the respondent lived with Donna and her parents and they assisted him in finding work. He was hired by an automobile dealership. According to a letter from the Service Manager of the dealership the respondent was selected for additional training and advancement because of hard work and good attitude (Tr. 28-30; letter, promotion report and certificate, Exh. 8). The record includes a letter from the respondent's probation officer stating that there is no record of new criminal activity, and that the respondent's response to supervision is considered excellent. Exh. 8.

The parties agree that the conspiracy conviction comprises the respondent's only criminal record. The respondent claims that he has no other history of drug-related

activities and drug use. His wife testified that he does not drink alcohol (Tr. at 64, 72).

The parties further agree that the respondent's wife and step-son would not be able to follow him to Lebanon, should he be deported, since United States citizens are prohibited from traveling to Lebanon.

In his decision, the immigration judge briefly reviewed these facts and found that the respondent was rehabilitated, stating that the respondent had "presented a very appealing case showing genuine rehabilitation" (I.J. decision at 3). However, the immigration judge denied relief in the exercise of discretion on the basis that the nature and seriousness of the crime outweighed the equities presented. The immigration judge also noted that the respondent applied for relief only 1 year beyond the statutory minimum of 7 years of residence as a lawful permanent resident. He also noted that the respondent's wife married the respondent knowing that he might be deported. Finally, as discussed above, the immigration judge commented on the length of the sentence and the time served by the respondent, opining that these facts also indicated the seriousness of the offense.

Section 212(c) of the Act provides that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of 7 consecutive years or more, may be admitted to the United States in the discretion of the Attorney General notwithstanding certain specified grounds for exclusion enumerated in section 212(a) of the Act. Moreover, an alien lawfully admitted for permanent residence

may apply for a section 212(c) waiver of inadmissibility even though he is in deportation rather than exclusion proceedings, as long as the ground for deportability with which he is charged is also a ground of excludability under section 212(a) of the Act. *Matter of Silva,* 16 I&N Dec. 26 (BIA 1976), *Matter of Granados,* 16 I&N Dec. 726 (BIA 1979). The grounds for exclusion which may be waived include section 212(a)(23) of the Act, which requires the exclusion of aliens who, like the respondent, have been convicted of a crime relating to a controlled substance.

Because the respondent was admitted to the United States as a lawful permanent resident in 1981, he is statutorily eligible for section 212(c) relief pursuant to the Act. However, an alien who seeks a section 212(c) waiver bears the burden of showing that he warrants such a waiver as a matter of discretion. *Matter of Duarte,* 18 I&N Dec. 329 (BIA 1982); *Matter of Khalik,* 17 I&N Dec. 518 (BIA 1980); *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978). In making a discretionary determination as to whether section 212(c) relief should be granted, the immigration judge "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country." *Matter of Marin, supra,* at 584.

In *Matter of Marin, supra,* at 584, we listed the following as "factors deemed adverse" to a section 212(c) application:

> The nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.

We also stated in *Matter of Marin, supra,* at 584-85, that favorable factors for a section 212(c) applicant include:

> Family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

In *Matter of Buscemi,* 19 I&N Dec. 628 (BIA 1988), we emphasized several aspects of our holding in *Matter of Marin, supra.* We reiterated that as the negative factors grow more serious it becomes incumbent upon the applicant to present additional off-setting favorable evidence in his behalf to show he warrants a favorable exercise of discretion. Moreover, we stated in *Matter of Buscemi, supra,* that an alien who has engaged in "serious criminal misconduct" must show "unusual or outstanding" equities before discretion may be exercised in the alien's

favor. *Id.* at 8. We also noted, however, that such a showing does not compel that discretion be exercised in the respondent's favor. *Id.* at 8. We also reiterated that a section 212(c) applicant with a criminal record "will ordinarily be required to make a showing of rehabilitation before relief will be considered as a matter of discretion." *Id.* at 10.

In *Matter of Edwards,* Interim Decision 3134 (BIA 1990), we clarified that *Matter of Buscemi, supra,* was not intended to imply that discretion need not be exercised where an alien failed to demonstrate unusual or outstanding equities to counterbalance a serious criminal record. Rather, a proper determination as to whether an alien has demonstrated unusual or outstanding equities can only be made after a complete review of the favorable factors in his case.

In his brief and at oral argument on appeal, the respondent has stated several allegations of error. First, the respondent claims that the immigration judge incorrectly weighed the equities versus the negative fact of the respondent's conviction. Counsel argues that the respondent demonstrated rehabilitation as well as unusual and outstanding equities and that it was error to deny relief on the basis of the single negative factor of record, namely , the respondent's conviction. Specifically, counsel argues that excessive weight was given to the respondent's conviction, and that insufficient weight was accorded the favorable equities demonstrated by the testimony and evidence. With regard to the conviction, the respondent pointed to the transcript of the sentencing

hearing of one of the co-conspirators in which the Assistant United States District Attorney stated that the evidence showed that the respondent was involved in the criminal scheme in a nonmanagerial capacity. Exhibit 6, at page 3. Counsel argues that this supports the respondent's testimony that his involvement in the scheme was for the most part as an unknowing participant who was misled by his brother into participating in the activities of the conspirators. Counsel also points out that the respondent expressed remorse for his part in the crime, that he has no other criminal record, and that he has never used drugs or alcohol. Thus, counsel argues that the excessive weight given by the immigration judge to the respondent's single, albeit serious, conviction results in a "one punch knock-out." That is, counsel argues that the single negative factor in this case should not serve to negate the unusual and outstanding equities presented.

By way of equities, counsel argues that the respondent demonstrated sufficient unusual and outstanding equities so as to warrant a discretionary grant of relief. First, counsel points out that United States citizens are forbidden from travelling to Lebanon. Thus, deporting the respondent to Lebanon will permanently separate the respondent and his United States citizen wife and step-son. Counsel argues that this will result in extreme hardship to his United States citizen wife, Donna, and his step-son. With regard to hardship, we are urged to consider the special marital history in this case. Specifically, counsel argues that the respondent's relationship with his wife dating back to 1980 distinguishes this equity from cases where the couple meet and are married while

deportation proceedings are underway. Here, the respondent and his wife had already had a close relationship for 2 1/2 years, were then separated, but got back together again when Donna actively sought out the respondent after having suffered severely at the hands of an abusive husband. Counsel argues that the history of abuse means that Donna is unusually dependent on the respondent emotionally. It is also pointed out that the respondent resumed a close relationship with Donna's family, who took him in after his release from Service custody in the summer of 1989, aided him in his job search and raised the money to pay the fine resulting from his conviction. Counsel points to the bond which has developed between the respondent and his step-son, characterizing it as "extraordinarily close" on the basis of the testimony and evidence presented. As an example, counsel mentions the fact that the boy calls the respondent "Dad" and refers to his natural father, whom he sees only occasionally, by his first name. Thus, it is argued that permanent separation will be particularly traumatic for Donna and the respondent's step-son, given the traumas they have already suffered.

Counsel also seeks to highlight that the respondent has spent his adulthood, and half his life, in the United States, that he has obtained advanced education while here. The respondent is depicted as a helpful and contributing member of the community with a good work history showing advancement based on his own initiative. It is also pointed out that the respondent would be returning to a country at war, in which his family has suffered.

Finally, counsel points out that even the immigration judge conceded that the respondent is rehabilitated,

having demonstrated that rehabilitation in prison and since his release in 1989.[2]

As noted above, the Service adopted the decision of the immigration judge as the Service position with regard to the appeal. At oral argument, the Service also argued that the respondent should not be considered rehabilitated since there is nothing in the record to prove that the respondent would not commit the crime again if faced with the same situation, i.e., pressure from his family.

Controlled substances offenses are viewed as very serious offenses under the immigration laws of the United States, except that offenses involving the simple possession of 30 grams or less of marijuana are viewed somewhat less seriously. *See* sections 212(a)(23), 212(h), 241(a)(11), 241(b), 241(f)(2), 244(a)(2), 244(e), and 245A(d)(2)(B)(ii)(III) of the Act; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4481 (1988). An alien convicted of a controlled substance offense involving intent to distribute is regarded as having been convicted of a serious drug offense and hence discretion will not be exercised in his favor unless he has shown unusual or outstanding countervailing equities. *Matter of Buscemi, supra; see Blackwood v. INS,* 803 F.2d 1165 (11th Cir. 1986) (per curiam); *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978); *Matter of Duarte,* 18 I&N Dec. 329

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[2] Counsel additionally seeks to present evidence on appeal regarding the respondent's continued satisfactory probation status, an additional promotion at work, and the fact that the respondent's wife has suffered a miscarriage causing her to take leave from her employment.

(BIA 1982); *see also Matter of Carrasco*, 16 I&N Dec. 195 (BIA 1977), *aff'd on other grounds sub nom. Carrasco-Favela v. INS*, 563 F.2d 1220 (5th Cir. 1977). Accordingly, the respondent must demonstrate unusual or outstanding equities before discretion may be exercised in his favor.

Despite the favorable factors of record, we do not find that the respondent has demonstrated sufficient unusual or outstanding equities necessary to overcome the serious crime for which he was convicted. The respondent was convicted of participating in a conspiracy to import and distribute large quantities of heroin on a continuing basis. As stated above, Congress has made it very clear that such a conviction is to be considered among the most serious of crimes. For this crime, the respondent received a substantial sentence and served a considerable number of years in prison. Moreover, despite the immigration judge's finding, we remain unconvinced as to the respondent's rehabilitation. He took part in an elaborate criminal conspiracy despite the obvious consequences if he should be discovered and despite the pernicious nature of the activity in which he was engaged. We are not persuaded by the respondent's good behavior since his conviction that he will not succumb again to his family's pressure and the temptation of the large profits to be had in such activities.

The respondent has demonstrated some substantial equities in his favor. Because of the situation in Lebanon and his wife's inability to go there, we find that the respondent has demonstrated an unusual equity. We also take into account that the respondent's wife and step-son are dependent on him and that his wife has suffered

emotional and medical problems, which add to the equities in favor of an exercise of discretion in the respondent's favor. On the other hand, we find that the weight of his family as a favorable equity is diminished because the respondent and his wife married after deportation proceedings were instituted, and with full knowledge that he might be deported.

As we stated in *Matter of Buscemi, supra,* and *Matter of Edwards, supra,* a showing of "unusual or outstanding" equities does not compel that discretion be exercised in the respondent's favor. Here, the respondent was convicted of a serious drug trafficking crime, and we find that the equities presented do not outweigh the favorable factors of record.

Accordingly, the decision of the immigration judge will be affirmed, and the appeal dismissed.

ORDER: The appeal is dismissed.

/s/ James P. Morris
FOR THE BOARD

U.S. Department of Justice **Decision of the Board of Immigration Appeals**
Executive Office for Immigration and Review
Falls Church, Virginia 22041

File: A24 447 284 – Atlanta Date: FEB -3 1992

In re: IBRAHIM FEZ GHASSAN

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
David A. Kattan, Esquire
419 Gravier Street
New Orleans, Louisiana 70130

ON BEHALF OF SERVICE:
Terry C. Bird
District Counsel

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] – Convicted of controlled substance violation[1]

APPLICATIONS: Motion to reopen; motion to reconsider; stay

In a decision dated July 12, 1991, this Board dismissed the respondent's appeal from the decision of an

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[1] Section 241(a)(11) of the Act has been amended and redesignated as section 241(a)(2)(B)(i) by section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), but that amendment does not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991.

immigration judge denying his application for relief under section 212(c) of the Act, 8 U.S.C. § 1182(c), and ordering the respondent's deportation to Lebanon. On August 21, 1991, the respondent, through new counsel, filed a motion to reopen and reconsider pursuant to 8 C.F.R. §§ 3.2 and 3.8. The respondent has also filed a motion to stay deportation pursuant to 8 C.F.R. §§ 3.6 and 243.4. The motions will be denied. The request for oral argument is denied. 8 C.F.R. § 3.1(e); 3.8(a).

The respondent is seeking to have his deportation proceedings reopened so that he can present new evidence and again pursue an application for relief under section 212(c) of the Act. However, the respondent lost his status as a lawful permanent resident upon the entry of this Board's decision on July 12, 1991 and is therefore statutorily ineligible for relief under section 212(c). *Matter of Cerna,* Interim Decision 3161 (BIA 1991). In *Matter of Cerna,* we denied a motion to reopen by a respondent in the same procedural posture as the respondent here, explaining that

> [t]he respondent cannot successfully move to reopen proceedings to again apply for relief under section 212(c) as he can no longer establish prima facie eligibility for such relief. An applicant for relief under section 212(c) of the Act must be a lawful permanent resident of the United States and must have a lawful unrelinquished domicile of 7 consecutive years. *See* section 212(c) of the Act; *Gonzalez v. INS,* 921 F.2d 236, 238 (9th Cir. 1990). This respondent is no longer a lawful permanent resident of this country as his status as such ended upon the entry of the final administrative order of deportation by

> this Board. *See* section 101(a)(20) or the Act, 8 U.S.C. § 1101(a)(20) (1988); *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987); *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd on other grounds, Lok v. INS*, 681 F.2d 107 (2d Cir. 1982); *see also* 8 C.F.R. §§ 3.1(d)(2), 3.37, 242.20, 243.1 (1991). For the reasons we enunciated in *Matter of Lok, supra*, barring a reversal on the merits of the respondent's deportability finding by an appellate court or administratively, the respondent lost his status as a lawful permanent resident on July 26, 1990. Thus, he is no longer statutorily eligible for relief under section 212(c). *Gonzalez v. INS, supra.*

Id., at 3 to 4 (footnote omitted). We further explained that

> the United States Court of Appeals for the Second Circuit recently found a decision of this Board denying reopening of deportation proceedings for this same reason to be "arbitrary and capricious." *Vargas v. INS*, 938 F.2d 358, 361-63 (2d Cir. 1991). The Second Circuit, in reversing our decision and in disagreeing with the Ninth Circuit's analysis in *Gonzalez v. INS, supra*, concluded that a respondent's eligibility for section 212(c) relief, once established, survives a finding of deportability. The court ruled that, even if a respondent no longer is a lawful permanent resident of the United States, he can successfully move to reopen proceedings to again apply for relief under section 212(c) so long as his eligibility for such relief had once been established. Authority from one circuit is not binding in another, however, and we respectfully decline to follow the holding in *Vargas v. INS* outside the jurisdiction of the Second Circuit . . .

Id., at 4. We then proceeded to explain in greater detail our reasons for not following the Second Circuit's holding outside of that circuit.

The respondent argues that this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit and that according to the decision of that court in *Garcia-Hernandez v. INS*, 821 F.2d 222 (5th Cir. 1987), the respondent remains eligible for reopening of proceedings despite the prior dismissal of the respondent's 212(c) claim by this Board. Respondent's memorandum in support of motion to reopen and reconsider at 3 to 4. In *Garcia-Hernandez*, the Fifth Circuit affirmed this Board's denial of a motion to reopen after a final order by this Board denying 212(c) relief had been entered; however, the respondent attempts to distinguish *Garcia-Hernandez* by arguing that the Fifth Circuit affirmed the denial or the motion to reopen because the original appeal had not only been dismissed by this Board, but also by the Fifth Circuit itself.

The respondent's interpretation of *Garcia-Hernandez* is erroneous. While the Court of Appeals did note that the respondent's motion to reopen in that case followed the denial of the respondent's appeal in that same court, the court based its holding on its precedent in *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987) in which it held that lawful status for purposes of applying for 212(c) relief ends upon the entry of this Board's decision determining the respondent to be deportable. The Fifth Circuit summed up its decision to affirm the denial of the motion to reopen in *Garcia-Hernandez* by stating that "the BIA was correct in deciding that [the respondent] no longer is eligible for § 212(c) relief because he is no longer a lawful

resident." *Garcia-Hernandez v. INS, supra* at 224. Thus, the Fifth Circuit's holding in *Garcia-Hernandez* supports our own holding in *Matter of Cerna, supra,* that, barring a reversal on the merits of the respondent's deportability finding by an administrative body or an appellate court, a respondent cannot successfully move to reopen proceedings to again apply for relief under section 212(c) subsequent to the final administrative order of deportation by this Board since his status as a lawful permanent resident ended upon the entry of that order.

We turn therefore to the respondent's motion to reconsider. The respondent first argues that this Board erred in "substituting its judgment for that of the [immigration judge] on the issue of Respondent's rehabilitation." Respondent's memorandum at 6. As we stated in our decision, we reviewed the immigration judge's decision de novo, and we stand by our finding regarding rehabilitation and the reasons supporting that finding.

We further point out that even if we had found that the respondent adequately demonstrated rehabilitation, such a finding would not be dispositive of the application for relief. The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved. There must be a balancing of the adverse factors evidencing the respondent's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears to be in the best interests of this country. *See Matter of Edwards,* Interim Decision 3134 (BIA 1990); *Matter of Buscemi,* 19 I&N Dec. 628 (BIA 1988); *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978). We have stated that an applicant for

relief under section 212(c) of the Act with a criminal record will ordinarily be required to make a showing of rehabilitation before relief will be considered as a matter of discretion. *Matter of Buscemi, supra,* at 635; *see Matter of Edwards, supra,* at 8.

In *Matter of Buscemi, supra,* we stated that an alien who has engaged in "serious criminal misconduct" must show "unusual or outstanding" equities before discretion may be exercised in the alien's favor. *Id.* at 633-634. Demonstrated rehabilitation can be such an equity, and when proven in a particular case it certainly carries great weight. However, a showing of rehabilitation does not compel a favorable exercise of discretion. We have noted that "[t]here are cases in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the face of unusual or outstanding equities." *Matter of Edwards, supra* at 7 (citing *Matter of Buscemi, supra,* as an example of such a case). Thus, in some cases the gravity of the conviction or convictions in question may outweigh a demonstration of unusual or outstanding equities, even including a showing of rehabilitation.

Our holding that a demonstration of rehabilitation does not in itself compel a grant of relief is consistent with the intent of Congress in enacting, and limiting, section 212(c). Congress has prohibited the granting of 212(c) relief to "an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." Section 212(c) of the Act, as amended by the Immigration Act of 1990 and section 306(a)(10) of Pub. L. No. 102-232, 105 Stat. 1733 (December 12, 1991). In so limiting the

availability of 212(c) relief, Congress is stating that it is simply not in the best interests of the United States to grant discretionary relief from deportation to aliens convicted of certain crimes, regardless of the equities they may present, including rehabilitation. That limitation on the availability of 212(c) relief implicitly acknowledges that an alien may have been rehabilitated following a conviction but that relief nevertheless should not be granted on account of the nature and gravity of the offense committed. Likewise, in our exercise of the discretionary authority conferred upon us, we do not find that rehabilitation, per se, compels a grant of relief. Rather, we "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country." *Matter of Marin, supra,* at 584.

The respondent was convicted of conspiracy to import and distribute a Schedule I Narcotic Substance, namely heroin. In the course of denying the motion to reopen in *Matter of Cerna, supra,* we stated that "[w]hile drug trafficking crimes of this nature are not unique in the gravity with which we view them, there are few adverse matters we view as more serious. We have never held – and certainly do not hold today – that there are no circumstances under which we might grant relief in the face of adverse matters of the nature present in this case." *Id.* at 9. Here, however, even if we were persuaded of the respondent's rehabilitation, the case before us is simply not one in which we are satisfied that a favorable exercise of discretion is warranted.

The respondent argues that he and his family stand to suffer greater hardship than previously contemplated because of changes in the application of the 20-year bar to reentry of aggravated felons to the United States. *See* section 212(a)(6)(B) of the Act. Respondent's memorandum at 5-6. This argument, too, is in the nature of a motion to reopen and is therefore unavailable to the respondent for the reasons stated above. Moreover, even if addressed as a motion to reconsider, we find no merit in this contention since the respondent, who has been ordered deported as an alien convicted of a controlled substance violation, has not demonstrated any additional hardship he will suffer on account of a change in the application of the aggravated felony provisions of the law.

The respondent asks us to reconsider our evaluation of the equities presented on the respondent's behalf. Respondent's memorandum at 7 to 8. The respondent weighs the equities presented differently than we do. However, he has not persuaded us that our decision, after consideration of all the evidence presented at the hearing, was in error.

The respondent argues that since we review the decision or the immigration judge de novo we should have considered the time elapsed during the pendency of the appeal from the decision of the immigration judge as an equity in the respondent's favor.[2] Respondent's memorandum at 8. This misconstrues the nature of this

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[2] This Board is not bound by the findings of the immigration judge and may review the record de novo. *Castillo-Rodriguez v. INS*, 929 F.2d 181 (5th Cir. 1991); *Parcham v. INS*, 769 F.2d 1001, 1005 n.3 (4th Cir. 1985); *Noverola-Bolaina v. INS*,

Board's review. We review the decision of the immigration judge de novo on the basis of the record existing at the time of the decision. It is not even permissible for us to take into account the additional time elapsed during the pendency of the appeal since we are not in a position to receive and evaluate evidence on how that time has been spent by the respondent. Absent exceptional circumstances, such as agreement by the parties as to the reliability of evidence submitted on appeal, we consider evidence submitted after the hearing only insofar as necessary to determine whether reopening or remand is required.[3] *See* 8 C.F.R. §§ 3.2, 3.8; *see also* 8 C.F.R. §§ 103.5, 242.22. Therefore, we did not err in declining to weigh as an equity the passage of time during the pendency of the appeal.

In a further allegation of error, the respondent notes that "Respondent's former counsel attempted to file additional evidence of Respondent's rehabilitation in connection with his appeal to the BIA." Respondent's memorandum at 5. Counsel argues that this Board erred in merely noting the receipt of such evidence but failing to state whether this additional evidence was in fact

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395 F.2d 131, 135 (9th Cir. 1968); *Goon Wing Wah v. INS*, 386 F.2d 292, 293-94 (1st Cir. 1967); *Chen v. Foley*, 385 F.2d 929, 935 (6th Cir. 1967), *cert. den.* 393 U.S. 838 (1968); *De Lucia v. INS*, 370 F.2d 305, 308 (7th Cir. 1966), *cert. den.* 386 U.S. 912 (1967); *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd, Lok v. INS*, 681 F.2d 107 (2d Cir. 1982); *Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969).

[3] A motion to remand to the immigration judge is subject to the regulatory requirements governing a motion to reopen. *Rodriguez v. INS*, 841 F.2d 865, 867 (9th Cir. 1987).

considered in its adjudication of the appeal. As explained above, our review is a review of the record before the immigration judge. We do not consider such evidence except insofar as is necessary to determine if the requirements of a motion to remand have been met. Here, the evidence related principally to the respondent's alleged rehabilitation. For the reasons stated above, we would not have granted a motion to remand on that basis. The rest of the evidence related to a miscarriage the respondent's wife had recently suffered. That fact alone, while possibly relevant to the hardship the respondent's wife would suffer upon the respondent's deportation, was also not a sufficient basis to warrant remand, even in combination with the other evidence on appeal.

The respondent argues that we should not have addressed the issue of rehabilitation since the Service raised it for the first time at oral argument after having merely submitted a memorandum adopting the immigration judge's findings (which included a finding that the respondent was rehabilitated). Respondent's memorandum at 7. By regulation, oral argument is part of the administrative review process which this Board may use to reach a decision. *See* 8 C.F.R. § 3.1(e). The respondent's counsel was, of course, present at the oral argument to argue the respondent's case. We therefore fail to see the unfairness suggested by the respondent. The respondent also argues that since a transcript of the oral argument was not prepared the oral argument is not part of the record and hence should not have been considered. As discussed above, this board does not consider new evidence in making its decisions and oral argument is

merely an additional venue for the presentation of arguments on appeal. As such, oral argument does not constitute additional evidence to be introduced into the record.

Accordingly, for the reasons stated above, the motions to reopen and reconsider shall be denied. Therefore, the request for a stay of deportation will also be denied.

ORDER: The motions to reopen and reconsider are denied.

FURTHER ORDER: The request for a stay of deportation is denied.

/s/ James P. Morris.
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4664
No. 92-4177

IBRAHIM FEZ GHASSAN,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petitions for Review of Orders of the
Immigration and Naturalization Service

(Filed SEP 8, 1992)

Before WISDOM, SMITH and EMILIO M. GARZA, Circuit Judges. JERRY E. SMITH, Circuit Judge:

Ibrahim Fez Ghassan, a native and citizen of Lebanon who was a permanent resident of the United States, was convicted of conspiracy to import and distribute heroin. After he was released from prison, the Immigration and Naturalization Service ("INS") began deportation proceedings. An immigration judge ("IJ") denied his application for waiver of deportation, and the Board of Immigration Appeals ("BIA") affirmed that denial and denied Ghassan's motions to reconsider or reopen. Ghassan petitions for review of the BIA's decisions. Finding that the decisions were within the BIA's discretion, we deny the petitions.

I.

Ghassan first came to the United States in 1978 at the age of seventeen to attend college in Minnesota. In 1980 he began dating Donna Owings, a United States citizen and resident of Minnesota. This relationship ended in 1982 when Owings moved to North Carolina with her parents.

In 1981 Ghassan gained permanent resident alien status. In 1983 he and several other Lebanese citizens, including his brother, began a scheme to import and distribute heroin. The following year, Ghassan pleaded guilty to an indictment charging him with conspiracy to import and distribute heroin; he was sentenced to eight years in prison and a $25,000 fine.

While Ghassan served his sentence, Owings contacted him and they began corresponding. She was married and had a son but was separated from her husband because he had abused her. Ghassan was released from prison in 1989 into the custody of the INS, which initiated deportation proceedings in Louisiana in March 1989, pursuant to 8 U.S.C. § 1251(a)(11).[1] Ghassan and Owings, who had divorced her first husband, were married in September 1989, at which time Owings knew that Ghassan was liable to be deported.

Ghassan was charged with deportability because of his heroin conspiracy conviction. He admitted the conviction, and the IJ found him to be deportable. Ghassan declared that he would apply for a waiver of deportation

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[1] Now codified at 8 U.S.C. § 1251(a)(2)(B)(i).

and for asylum; the application for asylum later was withdrawn.

In March 1990, the IJ held a hearing on the merits of the waiver application and then denied the application. Ghassan appealed this decision to the BIA, which received briefs and heard oral argument. The BIA denied the waiver application on July 12, 1991. Ghassan then filed a petition for review with this court.

While that petition was pending, Ghassan filed with the BIA a motion to reopen the deportation proceedings and a motion to reconsider its decision. The BIA denied both motions. Ghassan then sought our review of the denial of those motions. The petitions have been consolidated in this case.

II.

Section 212(c) of the Immigration and Naturalization Act[2] allows the Attorney General to waive deportation of eligible permanent resident aliens, including those convicted of controlled substances offenses. To be eligible for

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[2] 8 U.S.C. § 1182(c). By its terms the statute seems to apply only to aliens who temporarily left the country voluntarily, but the Second Circuit has held that the Equal Protection Clause forbids distinguishing between aliens who briefly left and reentered the country and are facing deportation proceedings and those who have not left and are being deported. *See Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976). The BIA applies the Second Circuit's ruling nationwide. *See Ashby v. INS*, 961 F.2d 555, 557 n.2 (5th Cir. 1992); *Mantell v. United States Dep't of Justice*, 798 F.2d 124, 125 (5th Cir. 1986).

waiver, an alien must have been in legal permanent residence for at least seven years. The INS does not dispute that Ghassan was eligible to apply for the waiver.

We recently explained the BIA's balancing test for considering applications under section 212(c):

> The immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country. . . . Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. . . . Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character.

Diaz-Resendez v. INS, 960 F.2d 493, 495-96 (5th Cir. 1992) (quoting *In re Marin*, 16 I & N Dec. 581, 584 (BIA 1978)). We also stated that "[a]pplicants for discretionary relief who have been convicted of serious drug offenses must show 'unusual or outstanding equities' " and that "an applicant with a criminal record will ordinarily be required to make a showing of rehabilitation." *Id.* at 496.

The IJ found that Ghassan had established rehabilitation but that the hardship Ghassan's wife faced was diminished because she had entered into the marriage with knowledge that he might be deported. The IJ also reasoned that Ghassan's length of residence was undercut by the fact that he had been a permanent resident alien for only one year more than the minimum required for eligibility under section 212(c). Finally, the IJ found it significant that he had served four and one-half years of his prison sentence, stating that such a duration was two years longer than normal.

On administrative appeal, the BIA ruled that the IJ had erred in attributing any significance to the length of Ghassan's incarceration. The BIA then considered the factors weighing in favor of granting waiver to Ghassan, most notably the extent to which his wife and her son depended upon him and the hardship they would suffer if he were deported, which would be exacerbated by the fact that United States law would prevent them from traveling to Lebanon with him. The BIA agreed with the IJ, however, that the wife's hardship was lessened by her prior knowledge of possible deportation.

The BIA also disagreed with the IJ's conclusion regarding rehabilitation, stating that it was "unconvinced" of Ghassan's rehabilitation. Finally, the BIA stressed the gravity of drug offenses under our immigration laws. After balancing the factors, the BIA dismissed the appeal.

III.

Although Ghassan questions the standard of review we apply to BIA decisions on section 212(c) applications, we recently made plain that we look for abuse of discretion. In *Diaz-Resendez*, decided after the briefs were submitted in the instant case, we stated,

> The Board's denial of an applicant's petition for relief under section 212(c) is reviewed for abuse of discretion. Such denial will be upheld unless it is arbitrary, irrational, or contrary to law. . . .
>
> Under this standard, the Board's decision may be reversed as an abuse of discretion when it is made without rational explanation, or inexplicably departs from established policies. Further, a decision by the Board may be found arbitrary if the Board fails to address meaningfully all material factors extant.
>
> Findings of fact supporting the Board's exercise of discretion, however, are reviewed merely to determine whether they are supported by substantial evidence.

Id. at 495 (citations omitted).

Ghassan argues that the BIA considered an irrelevant factor when it stated that his wife's hardship was diminished by the fact that she had entered the marriage with knowledge of his possible deportation. We disagree. The factors the BIA considers are equities, matters of fairness. Considering his wife's previous knowledge seems eminently equitable. *See In re Correa*, 19 I & N Dec. 130, 134 (BIA 1984) (discounting equities arising after a final order of deportation).[3]

Ghassan also argues that the BIA failed to consider all of the relevant evidence. Our examination of the BIA's opinion shows, however, that to the extent it can consider evidence presented for the first time on appeal, the BIA did consider all of Ghassan's evidence – it just did not find it compelling.

Finally, Ghassan argues that the BIA erred in finding that he was not rehabilitated. His challenge has two prongs: First, he argues that the BIA should not have disregarded the IJ's finding, because the INS did not challenge that finding in its brief.[4] We disagree.

Unlike the circuit courts of appeals, the BIA is not a court of error.[5] *See e.g., Cordoba-Chaves v. INS*, 946 F.2d

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[3] Although *Correa*, by its terms, applies only to equities arising after a final order of deportation, Ghassan has provided us with no convincing reason not to hold that prenuptial knowledge of the possibility of deportation is an equitable factor weighing against the hardship that a spouse may suffer.

[4] The INS did not file a formal brief with the BIA. Rather, it filed a memorandum adopting the IJ's findings.

[5] The cases upon which Ghassan bases this portion of his argument refer not to arguments raised before the BIA but to

1244, 1249 (7th Cir. 1991); *DeLucia v. INS*, 370 F.2d 305, 308 (7th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967). The BIA reviews the record *de novo* and is not bound by the IJ's findings. *Castillo-Rodriguez v. INS*, 929 F.2d 181, 183 (5th Cir. 1991); *Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987); *In re Lok*, 18 I & N Dec. 101, 106 (BIA 1981), *aff'd on other grounds sub nom. Lok v. INS*, 681 F.2d 109 (2d Cir. 1982).[6] Indeed, where no party has appealed an IJ's ruling, the BIA may certify proceedings to itself. 8 C.F.R. § 3.1(c) (1991). In the instant case, the BIA based its decision upon the administrative record as a whole. There was no procedural impropriety.

Second, Ghassan argues that the BIA abused its discretion because the evidence in the record overwhelmingly establishes his rehabilitation. We disagree again. In rejecting Ghassan's appeal the BIA stated,

> [D]espite the immigration judge's finding, we remain unconvinced as to the respondent's rehabilitation. He took part in an elaborate criminal conspiracy despite the obvious consequences if he should be discovered and despite the pernicious nature of the activity in which he was engaged. We are not persuaded by the respondent's good behavior since his conviction that

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arguments raised for the first time before courts of appeals. *E.g.*, *Zalega v. INS*, 916 F.2d 1257, 1259 (7th Cir. 1990); *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989).

[6] Although Ghassan likens findings of rehabilitation to findings of credibility, in which the BIA generally defers to the IJ, that analogy is incorrect. Findings of rehabilitation require consideration of evidence extrinsic to that presented by the subject witness and depend upon more than his demeanor.

> he will not succumb again to his family's pressure and the temptation of the large profits to be had in such activities.

The BIA did not refer to any specific evidence to support its finding that Ghassan is not rehabilitated. The BIA need not "write an exegesis on every contention," however. Rather, its opinion must reflect that "it has heard and thought and not merely reacted." *Luciano-Vincente v. INS*, 786 F.2d 706, 708-09 (5th Cir. 1986) (quoting *Osuchukwu v. INS*, 744 F.2d 1136, 1142-43 (5th Cir. 1984)). After reviewing the BIA's opinion and the record, we find that the BIA provided us with sufficient basis to review its decision.

The BIA's ruling states that Ghassan has not established that his brother will be unable to entice him into another criminal scheme. Ghassan has the burden of proving that he deserves discretionary relief from deportation. *Diaz-Resendez*, 960 F.2d at 495. Although Ghassan introduced several affidavits to his good character and excellent recent employment history, nothing in the record shows that his brother is no longer involved in criminal activity, nor is there evidence that Ghassan has become immune to his brother's blandishments or has broken off contact with him.

Indeed, according to his testimony during the waiver hearing, Ghassan solicited an affidavit from his brother that asserted that Ghassan had not been involved in the heroin conspiracy and had pleaded guilty in a plea bargain to protect the brother, an assertion that Ghassan

admitted was not true.[7] Further, as the BIA noted, nothing reveals how Ghassan would cope with financial hardship.

Having failed to prove rehabilitation, Ghassan could have little hope of obtaining section 212(c) waiver of deportation. Although rehabilitation is not a formal prerequisite for waiver, it is a crucial factor. "As the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence, which in some cases may involve unusual or outstanding equities." *Diaz-Resendez*, 960 F.2d at 496 (quoting *Marin*, 16 I & N Dec. at 585). "[A]n applicant with a criminal record will ordinarily be required to make a showing of rehabilitation before section 212(c) relief will be granted." *Id.*

Furthermore, as the BIA stated in its denial of the motion for reconsideration, even if Ghassan had been found rehabilitated, such a finding would not dispose of his application for relief. Ghassan's crime, participation in a well organized, international scheme to smuggle heroin into the United States and distribute it, was extremely serious.[8]

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[7] Additionally, at least one circuit court has recognized that the involvement of members of a petitioner's family in crime may be a negative factor in these proceedings. *Nunez-Pena v. INS*, 956 F.2d 223, 226 (10th Cir. 1992).

[8] The Supreme court repeatedly has acknowledged the severity of the societal problems stemming from the importation of illegal drugs. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (drug smuggling "one of the greatest problems affecting the health and welfare of our population"); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538

The BIA legitimately could conclude, consistently with its prior holdings, that when balanced against the equities in his favor, which were diminished because his wife married him knowing that he might be deported, the conviction tipped the scales, especially as his wife's son was not his by blood or adoption and Ghassan was not a child when he came to this country.[9]

IV.

We next consider Ghassan's petition to reopen the deportation proceedings. Ghassan moved for reopening so that the BIA could consider additional evidence of his rehabilitation and the hardship that deportation would cause him and his family. The BIA denied the motion because it found that Ghassan was statutorily ineligible to apply for relief under section 212(c).

(1985) (citing "veritable national crisis in law enforcement caused by smuggling of illicit narcotics"); *see also Scarabin v. Drug Enforcement Admin.*, 966 F.2d 989, 994-95 (per curiam) (discussing "drug scourge"); *Guan Chow Tok v. INS*, 538 F.2d 36 (2d Cir. 1976) (distinction between narcotics offenders and other offenders reasonable) (cited in *Anetekhai v. INS*, 876 F.2d 1218, 1224 (5th Cir. 1989)); *In re Cerna*, Interim Dec. 3161 (BIA Oct. 7, 1991) (few adverse matters BIA views as more serious than illegal drug importation).

[9] Ghassan also argues that the BIA erred in calling the hardship inflicted by his deportation to Lebanon, where his family could not follow, an unusual equity, rather than *two* unusual equities. This argument is without merit. The BIA engages in equitable balancing, not mathematical equations. *See Diaz-Resendez*, F.2d at 495-96.

In order to warrant reopening, a petitioner must make a *prima facie* showing that he is eligible for the relief sought. *INS v. Abudu*, 485 U.S. 904, 912 (1988). The BIA deems deportation determinations final after the board's decision on appeal. *E.g., Lok*, 18 I & N Dec. at 105; *see* [8] C.F.R. § 243.1 (1991). After such a final decision, the petitioner's status as a permanent resident alien is ended. *See* 8 U.S.C. § 1101(a)(20). Thus, the BIA reasoned that Ghassan's case cannot be reopened to reconsider section 212(c) relief because after the BIA's initial determination, he no longer meets the section 212(c) requirement of seven years as a permanent resident alien, as he is no longer a permanent resident alien.

Although Ghassan disputes the standard of review, it is settled that we review the denial of a motion to reopen for abuse of discretion. *See INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985). Where the denial rests on a finding of statutory ineligibility, we also review for errors of law. Finally, we give great weight to the agency's interpretation of it[s] own regulations, but this interpretation may be discounted if it is plainly unreasonable. *Ka Fung Chan v. INS*, 634 F.2d 248, 252 (5th Cir. Jan. 1981).

Ghassan objects to the fact that the BIA treats the motion to reopen as a *new* application for section 212(c) relief. If this were the first time he had attempted to obtain relief under section 212(c) in the context of these proceedings, such a rule would make sense, he argues, but when a petitioner is seeking to reopen the proceedings to present new evidence on the same grounds for relief, treating the motion as a new application seems unreasonable.

Our prior decisions preclude Ghassan's argument. We have already effectively upheld the BIA's practice. In *Garcia-Hernandez v. INS*, 821 F.2d 222, 224 (5th Cir. 1987), where we had affirmed the denial by the BIA of section 212(c) relief before a motion to reopen was filed, we stated, "[W]hen that [section 212(c)] claim was defeated finally by denial in appeal to this court and the determination of deportability had also become final before that time, there was no longer any authority to reopen . . . because petitioner clearly was no longer in lawfully admitted permanent residence." We also have upheld the INS's position that a deportability decision becomes final at the time the BIA renders its decision and that permanent resident alien status ends at that time. *See Rivera v. INS*, 810 F.2d 540, 541-42 (5th Cir. 1987), *vacating on reh'g* 791 F.2d 1202 (5th Cir. 1986).

In *Rivera* we considered whether a petition for section 212(c) relief could be instituted after a final decision of deportability. In the instant case, as in *Garcia-Hernandez*, the original petition for section 212(c) relief was filed before the final decision of deportability; thus, Ghassan had the right to pursue that relief. Unlike the circumstance in *Garcia-Hernandez*, the BIA's decision to deny section 212(c) relief has not been upheld by this court. That does not provide a basis upon which to distinguish this case.

In *Garcia-Hernandez* we concluded that the BIA was correct in holding that the petitioner was no longer eligible for section 212(c) relief because he was no longer a lawful resident and so could not obtain reopening. 821 F.2d at 224. Under *Rivera* an alien's lawful status ends when the BIA rules him deportable. 810 F.2d at 541-42.

Thus, after the BIA decides that an alien is deportable, he is no longer a legal resident and thus is not eligible for section 212(c) relief, so his petition for reopening must be rejected.[10] Accordingly, the BIA did not err in denying Ghassan's motion to reopen.

V.

Ghassan makes three arguments as to his motion to reconsider. First, he raises essentially the same points as in his petition on the merits. Second, he contends that the BIA erred by not considering evidence that was submitted during the appeal and with the motion to reconsider. Third, he states that the BIA erred in refusing to reconsider that a change in INS policy, banning deportees from reentry for twenty years, rather than five, increased the hardship on him and his family.

We review the denial of a motion to reconsider for abuse of discretion. *Osuchukwu*, 744 F.2d at 1141. Reopening and reconsideration are not favored. *Abudu*, 485 U.S. at 107. We do not believe that the BIA erred.

Ghassan's first point of error reiterates his arguments concerning the plural nature of his outstanding equities, the BIA's consideration of his rehabilitation, and the BIA's discounting of his family hardship because his marriage occurred after deportation proceedings had begun. We already have rejected those arguments and need not revisit them.

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[10] *Accord Gonzales v. INS*, 921 F.2d 236, 240 (9th Cir. 1990) (upholding rule). *Contra Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991) (holding rule arbitrary and capricious).

Nor do we accept Ghassan's second argument that the BIA erred by not considering additional evidence of his rehabilitation and hardship that he submitted during the administrative appeal. The BIA stated that it did not consider this evidence because the BIA considers only the record that was before the IJ. The BIA is correct.

When evidence is submitted with a motion to reopen or reconsider, the BIA considers that evidence only as necessary to determine whether a new hearing is warranted. *See* 8 C.F.R. § 3.8 (1991) ("Motions to reopen shall state the new facts to be proved at the reopened hearing. . . . "). It would be inappropriate for the BIA to revise its opinion based upon evidence that had not been tested in the "crucible of the judicial process," including cross examination.[11]

Finally, Ghassan argues that the BIA should have reconsidered because his hardship was increased by a change in INS policy, whereby his reentry after deportation would be barred for twenty years instead of five.[12] The BIA correctly noted that this was, in essence, a motion to reopen for consideration of additional evidence and thus, as we have explained, was not available to Ghassan. The BIA further stated that even if it considered

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[11] *See Briscoe v. LaHue*, 460 U.S. 325, 333 (1983); *Marrero v. City of Hialeah*, 625 F.2d 499, 508 (5th Cir. 1980) (quoting *Imbler v. Pechtman*, 424 U.S. 409, 439-40 (1976) (White, J., concurring)).

[12] *See* 8 U.S.C. § 1182(a)(6)(B) (deported alien convicted of an aggravated felony who seeks admission within 20 years is excludable). In 1991 the INS announced that it would apply that provision to convictions that predate its enactment in 1988. 68 *Interpreter Releases* 341 (Mar. 25, 1991).

the matter to be a motion to reconsider, Ghassan had not demonstrated any additional hardship he will suffer on account of the change in the law.

We do not believe that the BIA abused its discretion in rejecting the motion. The portion of Ghassan's motion addressing the INS policy seeks to convince the BIA to consider new facts that were not before the IJ. It is thus a motion to reopen, not a motion to reconsider. *See Pierre v. INS*, 932 F.2d 418, 421-22 (5th Cir. 1991); 8 C.F.R. § 3.8 (1991). For reasons already discussed, Ghassan was no longer eligible for reopening, and we reject his argument.

VI.

We recognize that deporting Ghassan may cause hardship to him, his wife, and her son. Nevertheless, in light of the well established public policy against drug trafficking, we cannot say that the BIA abused its discretion in mandating Ghassan's deportation. As the importation of illegal narcotics continues to pose a grave menace to society, those involved with the drug trade can expect to find that they inevitably hurt those they care for as well as those upon whom they prey.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4664

INS No. A24-447-284

IBRAHIM FEZ GHASSAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent,

Petition for Review of an Order of the
Immigration and Naturalization Service

(Filed SEP 08 1992)

Before WISDOM, SMITH, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Ibrahim Fez Ghassan for review of an order of the Board of Immigration Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the Board of Immigration Appeals in this cause is affirmed.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

September 8, 1992

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4177

INS No. A24-447-284

IBRAHAM FEZ GHASSAN,

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versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent,

Petition for Review of an Order of the Immigration and Naturalization Service

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(Filed SEP 08 1992)

Before WISDOM, SMITH, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

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September 8, 1992

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4664
92-4177

IBRAHAM FEZ GHASSAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petitions for review of Orders of the
Immigration and Naturalization Service

(Filed OCT 8, 1992)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 9-8-92, 5 Cir., 198_, ___ F.2d ___)

(October 8, 1992)

Before WISDOM, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IMMIGRATION ACT OF 1990
REPORT ON CRIMINAL ALIENS

(SEAL)

APRIL 1992

REPORT ON CRIMINAL ALIENS

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PREFACE

On November 29, 1990, the Immigration Act of 1990 (IMMACT 90) was signed into law. Section 510 of IMMACT 90, [8 U.S.C. 1251 note], provides:

> The Attorney General shall submit to the appropriate Committees of the Congress, by not later than December 1, 1991, *A REPORT THAT DESCRIBES THE EFFORTS OF THE IMMIGRATION AND NATURALIZATION SERVICE TO IDENTIFY, APPREHEND, DETAIN, AND REMOVE FROM THE UNITED STATES ALIENS WHO HAVE BEEN CONVICTED OF CRIMES IN THE UNITED STATES.*
>
> The report shall include a statement of:
>
> (1) Number of aliens in the United States who have been convicted of a criminal offense in the

United States and, of such number, the number of such aliens who are not lawfully admitted to the United States;

(2) Number of aliens lawfully admitted to the United States who have been convicted of such an offense and, based on such conviction, are subject to deportation from the United States;

(3) Number of aliens in the United States who are incarcerated in a penal institution in the United States and, of such number, the number of such aliens who are not lawfully admitted to the United States;

(4) Number of aliens whose deportation hearings have been conducted pursuant to Section 242A(a) of the Immigration and Nationality Act, and the percentage that such number represents of the total number of deportable aliens with respect to whom a hearing under such section could have conducted since November 18, 1988;

(5) Number of aliens in the United States who have reentered the United States after having been convicted of a criminal offense in the United States.

Within each of the numbers of aliens specified under this subsection who have been convicted of criminal offenses, the Attorney General shall distinguish between criminal offenses that are aggravated felonies (as defined in Section 101(a)(43) of the Immigration and Nationality Act, as amended by this Act) and for other criminal offenses.

The Attorney General shall include in the report a plan for the prompt removal from the United States of criminal aliens who are subject to exclusion or deportation. Such plan shall also

include a statement of additional funds that would be required to provide for the prompt removal from the United States of–

(1)(A) Aliens who are not lawfully admitted to the United States and who, as of the date of the enactment of this Act, have committed any criminal offense in the United States, and (B) aliens who are lawfully admitted to the United States and who, as of such date, have committed a criminal offense in the United States the commission of which makes the alien subject to deportation; and

(2)(A) Aliens who are not lawfully admitted to the United States and who, in the future, commit a criminal offense in the United States, and (B) aliens who are lawfully admitted to the United States and who, in the future, commit a criminal offense in the United States, the commission of which makes the alien subject to deportation.

Such plan shall also include a method for identifying and preventing the unlawful reentry of aliens who have been convicted of criminal offenses in the United States and removed from the United States.

This report has been prepared in response to these requirements of the law.

REPORT ON CRIMINAL ALIENS

– INTRODUCTION –

The Immigration and Naturalization Service (INS) is the executive agency responsible for administering the Nation's immigration and nationality laws.

The mission of the INS includes a responsibility to detect and deter violations of the criminal and administrative provisions of the Immigration and Nationality Act and related Federal statutes.

The INS has long acknowledged its responsibility to identify criminal aliens, particularly those who are involved in drug-related, violent, or organized criminal activity. The INS criminal alien program's objective is to deport criminal aliens from the United States as expeditiously as possible.

Increased immigration during the last decade has coincided with a sharp rise in alien involvement in criminal activity nationwide. Recognizing this trend through its interactions with Federal, state and local criminal justice agencies, the Department of Justice (Department) has emphasized efforts to identify, apprehend and remove criminal aliens from the United States. The removal of aliens involved in criminal activity is one of the highest priorities within the Department's mission. In recent years, the INS has dedicated more than one-third of its 1,100 field investigators to criminal alien activities, balancing these responsibilities with duties to enforce employer sanctions and to combat immigration fraud.

To illustrate the magnitude of the growing dimensions of the overall criminal phenomenon that confronts INS, the results of two recent studies are profiled below:[1]

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[1] "Prisoners in 1990," BJS Bulletin, NCJ-129198, conducted by the State Statistical Analysis Centers and "Probation and Parole 1989," BJS Bulletin, NCJ-125833.

- The Bureau of Justice Statistics estimated that at year-end 1989, 4.1 million adults (about 1 in every 46, within the United States) were under the care or custody of a corrections agency.

- Since 1980 the Nation's prison population has increased by almost 134 percent.

- About 75 percent of all convicted offenders are presently in a parole/probation status, rather than being incarcerated.

- At year-end 1989, 2,520,479 adults in the United States were on probation, while 456,797 were on parole.

- During 1989, the number of adults on probation grew by nearly 6 percent and the number on parole grew by 12 percent.

As the correctional population increases so does the task of alien identification. Given the complexity of the immigration law, in order to determine citizenship or alien status, an INS officer must interview and make a determination as to each inmate's immigration status. The difficulty of identification is compounded by the fact that (according to Census Bureau reports) there are 3,344 local jails, 1,220 state correctional institutions, and 96 Federal facilities. Approximately 3,005 offices throughout the United States are currently supervising convicted offenders in the community (probation, parole). To cover 7,665 facilities and offices is an enormous task even if all 1,100 INS investigators could devote all of their time to criminal alien activities.

Section 510 of IMMACT 90, [8 U.S.C. 1251 note], requires the Attorney General to submit to the appropriate Committees of the Congress statistics relating to the total number of criminal aliens in the United States, including those who have been arrested by other Federal, state and local law enforcement authorities. Since other law enforcement agencies do not report arrests of aliens to the INS and in the absence of a national criminal alien data base, the Department is limited to providing statistics relating to the arrests of aliens by the INS.

Section 507 of IMMACT 90, [42 U.S.C. 3753], requires the states to notify the INS of convictions of aliens who have been convicted of violating the criminal laws of the state, and subsequently to furnish certified records of conviction. Through this new provision of law, the Department expects that a more accurate count of the total number of criminal aliens can be calculated in the future. The notification of convictions of aliens by all of the states in conjunction with the INS Enforcement Case Tracking System and the National Enforcement Operations Support Center (detailed discussion later in this report) will facilitate the identification of criminal aliens in the various stages of processing in Federal and state criminal justice systems.

The Department recognizes the magnitude of the task of interacting with such a diversity of agencies and activities in order to isolate the criminal alien segment of the population for purposes of identification and tracking. Notwithstanding the accomplishments already achieved by the INS in placing significant emphasis on this area, there is a noted disparity between the size of the diverse

criminal alien population and the INS resources available to address the problem.

- As of October 1, 1991, 64,131 individuals were housed at Federal institutions; 16,060 are foreign born.[2] This represents approximately 25 percent of the Federal Bureau of Prisons population.
- State correctional institutions reported that the average daily prison population in September 1991 was 707,212 individuals; 41,184 listed a foreign country as their place of birth.
- Probation and Parole offices report that they do not maintain statistical information on foreign born.[3]
- The total number of foreign born inmates in the five states with the highest concentration of such inmates in the state prison systems (California, New York, Texas, Florida and Illinois), is 33,400. This represents approximately 12 percent of their population.
- The INS deported over 13,000 criminal aliens in Fiscal Year 1991 (FY). This was an increase of 57 percent from FY 1990.

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[2] Federal and state prison records do not distinguish between noncitizens and foreign born. If an inmate lists a country of birth other than the United States, he is counted as a foreign born inmate. Local INS offices are advised of the number of foreign born inmates incarcerated in Federal and many state correctional facilities. The aliens are then interviewed by INS officers to determine citizenship or alien status.

[3] The INS has sent questionnaires to these offices requesting assistance in gathering this information. The responses continue to be received and consolidated.

To deal with the increasing number of criminal aliens in the United States, the INS has developed a Criminal Alien Strategy that currently directs its activities towards establishing liaison with Federal, state, and local law enforcement agencies to assist in identifying criminal aliens incarcerated in penal institutions. Criminal aliens are identified as soon as possible after they enter Federal and state correctional facilities. An investigation is conducted to determine the alien's eligibility for deportation. The INS also seeks to identify criminal aliens not incarcerated, such as those who are on probation or parole, in half-way houses and those who pose a greater danger to the community by virtue of their criminal conduct.

The success of the Criminal Alien Strategy relies on establishing points in the criminal justice system through which an alien must pass in completing the judicial correctional process. These areas are the most logical places for the INS to efficiently identify criminal aliens.

– DEPARTMENTAL EFFORTS –

IDENTIFICATION, APPREHENSION, DETENTION AND REMOVAL INITIATIVES

The Department, has introduced innovative programs to identify, apprehend, detain, and expeditiously remove from the United States aliens who have been convicted of crimes in the Unites States. These programs focus enforcement efforts on aliens posing the greatest threat to American society–those involved in criminal activity.

INSTITUTIONAL HEARING PROGRAM

The Immigration Reform and Control Act of 1986 and the Anti-Drug Abuse Act (ADDAA) of 1988 authorized the expeditious removal of criminal aliens. In response to these statutes, the INS and the Executive Office for Immigration Review (EOIR) formulated a process to accomplish this goal.

The INS has established centralized locations at state correctional intake facilities for easier identification of incarcerated criminal aliens and an Institutional Hearing Program (IHP) for expedited administrative hearings. The IHP, a cooperative effort of the EOIR and correctional agencies, enables the INS and the EOIR to begin deportation proceedings for aggravated felons and other criminal aliens while they are still serving their sentences. This process significantly reduces detention costs by ensuring, in many cases, immediate deportation upon the completion of the alien's sentence.

Within the Federal correctional system, the INS has implemented an agreement with the Bureau of Prisons (BOP) to consolidate all male prisoners, (except Cubans and Mexicans[4]) who are deportable aliens, at the Federal Correctional Institution in Oakdale, Louisiana (Oakdale

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[4] Cubans are not included because the INS is unable to deport most of them. Based on a formal arrangement, Cuba has agreed to accept 2,746 Cubans following deportation. Others must be negotiated on a case by case basis.
The number of incarcerated Mexicans prohibit Oakdale from consolidating all of them. Mexicans are incarcerated elsewhere, closer to the Mexican border, where they will ultimately be deported.

I). This enables the INS to initiate deportation hearings and remove criminal aliens from the United States immediately upon completion of their Federal sentences. This joint INS/BOP facility currently houses more than 600 convicted alien felons who previously were dispersed throughout the BOP facilities nationwide.

The INS and the EOIR began to concentrate limited staffing resources on a system of hearings in correctional institutions. The IHP is well developed and working smoothly at the Federal level. The goal of the IHP is to complete all administrative reviews prior to completion of the alien's sentence.

Since FY 1991, 1,447 criminal aliens have been deported to their homelands from Oakdale I. Today, approximately 10 percent of the criminal alien cases are conducted through the 71 IHPs located across the country in 3 BOP and 68 state correctional facilities. Further expansion of the Federal IHP is presently being discussed with the BOP, the EOIR and the INS. This process, however, does not apply to cases where an immigration judge orders a change of venue based on an alien's application for administrative relief. Change of venue cases are handled through District Offices, and require that aliens be detained at INS facilities after the completion of their criminal sentences for the necessary deportation actions.

Removal of criminal aliens within the IHP process begins with the identification by the INS, with the assistance of local law enforcement and state prison officials, of criminal aliens in the state correctional system. An INS Officer

conducts interviews to determine if the aliens meet criteria which make them eligible for deportation proceedings.

Once a qualifying alien is identified, the INS Officer must prepare a charging document. The case is then filed with the EOIR. Cases filed for inclusion in the IHP must meet certain EOIR criteria for acceptance. The charging documents must be conviction-based and the alien must have at least 6 months remaining on his sentence. The reason for such criteria is to conserve limited EOIR judicial resources and ensure sufficient time for the case to be heard in a deportation hearing prior to release of the alien.

The INS also accepts custody of, and detains, criminal aliens who have finished their sentences without the completion of administrative hearings. The INS detains criminal aliens at Service Processing Centers, contract facilities, joint BOP/INS facilities, and state and local jails. The INS has approximately 5,900 bed spaces available to detain aliens, and 60 percent of this bed space is utilized for the detention of criminal aliens.

A number of factors precludes the INS from directing all cases into the IHP. Many criminal aliens are unknown to the INS, even though convicted and incarcerated. Many of these aliens, although eligible for deportation, may also be incarcerated only for short periods of time in more than 4,500 state and local facilities across the United States. This makes it difficult for the INS to identify them and determine deportability during their period of incarceration. In other cases, the INS has difficulty locating and obtaining the certified records of conviction required

to sustain deportation on criminal grounds. Finally, due process requirements are interposed in the hearing process. Certain types of aliens are eligible for waivers of relief from deportation, even though they have been convicted of aggravated felonies. All of these factors contribute to administrative burdens and delays in the administrative deportation process.

FIVE STATE CRIMINAL ALIEN MODEL

As part of the effort to identify and process criminal aliens in state correctional systems, the INS has initiated a Five State Criminal Alien Model. This project focuses limited INS investigative and trial attorney resources on the States having the highest concentration of criminal aliens.

Through discussions and agreements among the INS, the EOIR, State Governors, and State Attorneys General, the Five State Model proposes cooperative efforts with state criminal justice agencies to screen for deportation the 33,400 foreign born inmates in state correctional facilities in California, New York, Texas, Florida and Illinois. Successful implementation of this model will continue to expedite the identification process and improve the INS' ability to obtain certified conviction records, to determine at the earliest time possible when a foreign born inmate enters the state penal system, and to facilitate administrative review proceedings by centralizing alien prisoners into fewer institutions. Eventually, it is contemplated that standardized approaches and improvements in the processing of criminal aliens developed in the Five State Model will be expanded to all jurisdictions.

CONVICTION RECORDS

Section 507 of IMMACT 90, [42 U.S.C. 3753], requires that each state ensure, as part of its application for Federal grant funds, that it has established a plan to provide, to the INS, without fee, notice of conviction of aliens who have been convicted of violating the criminal laws of the state, within 30 days of the date of conviction, and under which the state will provide the INS with the certified record of conviction within 30 days of the date of a request by the INS for the record. This provision of IMMACT 90 supports, the INS in obtaining the certified records necessary to place a criminal alien into expedited deportation proceedings.

The INS and the Bureau of Justice Assistance (BJA) have worked closely to develop guidance to be submitted to the states for implementation of this new law. The BJA has received approval from the Office of Management and Budget (OMB), and has disseminated final guidance to the states for the preparation of plans in early 1992.

This provision of law is critical to enable the INS to remove criminal aliens from the United States. During an administrative deportation hearing, the INS is required by law to present a certified record of conviction to secure the deportation of an alien on criminal grounds. In many instances, without corroborative evidence of the crime presented by the immigration trial attorney, the alien could be released from custody on a relatively low bond, and would be eligible to seek avenues of administrative relief under the law.

ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE

The INS has been a participant in the Organized Crime Drug Enforcement Task Force (OCDETF) since December 1986. One of the goals of the OCDETF program is to identify criminal aliens involved in narcotics trafficking who are not yet incarcerated. Through OCDETF, the INS works cooperatively with other law enforcement agencies that direct their activities toward major drug organizations. The INS brings its unique statutory authority and expertise in dealing with diverse ethnic groups to this multi-agency effort against organizations involved in drug trafficking and related crimes of violence.

The INS participation in OCDETF and other organized crime task force investigations is consistent with the mission of instituting deportation proceedings against those engaged in serious criminal activities in the United States. Most aliens serving sentences today in Federal and state prison systems have been convicted of narcotics trafficking offenses.

In accordance with the Anti-Drug Abuse Act (ADAA) of 1988, the INS increased its commitment to OCDETF during FY 1991 through establishment of the OCDETF Pilot Project. Under the pilot project, the INS offices in four cities, assist Federal, state, and local law enforcement entities investigate narcotics trafficking and violent crimes involving aliens. The cities selected for the pilot – Houston, Los Angeles, Miami and New York – have also been designated by the Office of National Drug Control Policy (ONDCP) as high intensity drug trafficking areas (HIDTA).

Through OCDETF, INS Senior Special Agents participate in task force operations, along with other Federal, state, and local drug enforcement agencies, targeting organizations comprised of, or controlled by, foreign nationals. The last decade has witnessed a dramatic rise in organized criminal activity carried out by foreign nationals, warranting a strong response by the INS. Through the INS' direct participation, these investigations led to the arrest and institution of deportation proceedings against 1,980 aliens involved in drug trafficking and related violent crimes in FY 1991.

ORGANIZED CRIME INITIATIVES

The INS also participates in the Organized Crime and Racketeering Strike Force (OCRSF) of the Department of Justice, in an effort to identify criminal aliens not incarcerated. Under the authority of the Department of Justice, officers investigate complex organized crime cases involving traditional and emerging ethnic organized crime groups and thereby identify aliens actively involved in criminal activity.

The INS investigates organizations whose members have violated Federal laws, including Racketeer Influenced Corrupt Organizations (RICO) violations. The organizations are now more diversified and may be involved in legitimate enterprises – masking their roles in unlawful "businesses" such as smuggling and trafficking in narcotics and aliens. In many instances in these complex cases, an individual member's deportability or susceptibility to prosecution for violation of INS statutes is often

the effective mechanism for disrupting a criminal organization's activities.

Highly structured criminal organizations, as well as more loosely organized groups of individuals, increasingly control substantial portions of lucrative criminal enterprises engaged in the following types of criminal activities: altering, counterfeiting and unauthorized vending of INS documents; organized prostitution; harboring and smuggling of aliens; marriage fraud; trade, manufacture, and/or trafficking in narcotics; income tax evasion; wire and mail fraud; RICO violations; money laundering; theft and purchase of firearms and explosives; medical, bank and benefit fraud and related complicated financial schemes; currency violations; racketeering; official corruption; wire fraud; involuntary servitude; auto theft rings; arson; extortion; and food stamp fraud (government entitlement programs).

The INS agents' knowledge, expertise and statutory authority places him/her in a unique position to counter a range of criminal activity by aliens. As a result, the INS is taking an increasingly active role in this national organized crime effort.

NCIC – WARRANTS OF DEPORTATION

Since a large number of criminal aliens encountered by the INS are not incarcerated in a penal institution and since the INS has only limited detention space of its own, emphasis is placed on identifying and arresting aliens who have been convicted of aggravated felonies but who are still at large in the community. The INS now has access to the National Crime Information Center (NCIC)

and the National Law Enforcement Telecommunications System (NLETS). These systems automate the exchange of information on criminal aliens between the Service and state and local criminal justice agencies.

The INS and the Federal Bureau of Investigation (FBI) recently reached an agreement permitting the INS to begin entering warrants based on criminal grounds into the NCIC. On December 1, 1991 the INS began a pilot project which involves entering into the NCIC data base the first 1,000 of the 10,875 names of aliens convicted of aggravated felonies who failed to report for deportation proceedings. The INS will be notified by the arresting agency whenever one of these deportable aliens is encountered by law enforcement officers in the course of their normal duties. The success of this initiative will be assessed upon completion of a 6-month trial period, with the anticipation of further expansion.

CRIMINAL ALIEN TRAINING FOR LOCAL POLICE

Many communities in the United States have reported to the INS an increased involvement of aliens in drug importation, weapons smuggling, and violence against persons and property in the past decade. To better inform police agencies and elevate the level of cooperation with the INS, a training seminar for local law enforcement officers was organized under a joint project by the INS and the International Association of Chiefs of Police (IACP) to provide specific information concerning the role and authority of the INS officer.

The problems resulting from criminal aliens in the community invariably extend beyond the capabilities of the

local police. The cooperation of the INS and the application of immigration expertise provide vital assistance to local law enforcement agencies in dealing with alien crime in their communities. Positive and effective identification of aliens involved in criminal activities often require knowledge and understanding of INS-issued identification documents and the Service's enforcement priorities and methods of operation.

The Bureau of Justice Assistance has provided support and funding, through grants, to create a tuition-free training program specifically designed to enhance the local police manager's ability to recognize and respond effectively to criminal activity by aliens. The goal of this program is to provide all local law enforcement officials with a basic understanding of immigration law that, in turn, can enhance their own investigative tactics and operations.

During 1991 the seminar, "Responding to Alien Crimes" was held in 5 major metropolitan locations throughout the United States. More seminars are scheduled for 1992.

– FUTURE INITIATIVES –

NATIONAL ENFORCEMENT OPERATIONS SUPPORT CENTER

To satisfy the requirements of the "criminal alien" provisions of the Immigration and Nationality Act, as amended by the Anti-Drug Abuse Acts of 1986 and 1988, the Department has proposed the establishment of a National Enforcement Operations Support Center (NEOSC). Establishment of the center was supported by the Department in the FY 1992 budget request, and,

because no funds were appropriate for this purpose in FY 1992, the Department supported the request again in the FY 1993 Budget as submitted to Congress. That request includes $1.5 million, 44 positions and 11 workyears to establish the center. In addition, the Attorney General has instructed the INS to move ahead with the establishment of the center this fiscal year through use of the enforcement fines resources.

Plans call for the NEOSC to be operational by the INS on a 24-hour basis. Information for law enforcement purposes will be provided to police referrals relative to persons in custody believed to be aliens who have committed serious crimes. The center will be accessible by a "900 number." Law enforcement authorities querying the center will communicate with an INS operator who will make an initial determination as to the information available in the INS files and the level of the INS response warranted by the query.

The NEOSC will provide a centralized data base for storing criminal alien information. All routine inquiries will be handled by the INS NEOSC operators with on-site agent staff to deal with more complex operational matters. Cases involving aggravated felonies will be referred to agents in the field for immediate investigative responses. All other queries will be logged into the computer system and electronically forwarded to the INS field office for any necessary follow-up that the facts warrant. If subsequent inquiries pertaining to the same alien were received, the inquiring agency would be referred to a designated INS field office for administrative handling during normal working hours.

ENFORCEMENT CASE TRACKING SYSTEM

The Department recognizes, and strongly supports, INS' need to automate and integrate many of the processes it currently employs to identify and track criminal aliens for eventual deportation. The Department has singled out for special funding support a major automation initiative which began during FY 1991. This automated process will eventually allow INS field offices to access a common data base and communicate with each other by computer, thus facilitating the tracking of criminal aliens by the INS. This Enforcement Case Tracking System (ENCATS) prototype is a major multi-year information systems project now in the initial stages of development.

The case tracking system prototype will be installed in early 1992 and will be operational in four cities: Philadelphia, Chicago, Atlanta, and San Diego. The prototype provides automation of case management and statistical reporting, and will also allow local entry of identification and historical data relating to individual criminal aliens.

The ENCATS will be the primary data base to automate the documentation and exchange of information regarding suspects and incidents related to criminal alien activity. By ensuring timely tracking by the INS of criminal aliens through the diverse Federal and state criminal justice systems, the ENCATS system will provide a substantial benefit to the entire law enforcement community. Ultimately, this system will generate the necessary data that will enable the INS to define the specific dimensions of the criminal alien population.

ADMINISTRATIVE AND LEGISLATIVE IMPROVEMENTS

1. To accelerate, wherever possible, the administrative review process for deportation, the INS is implementing pilot projects enabling an immigration judge to establish grounds for deportability on the written trial record when an alien and his counsel agree to waive a formal hearing. One pilot project relying on this approach has been used successfully in Texas. The purpose of this pilot effort is to dovetail, within the limits of due process, the criminal justice system and the administrative deportation system, thereby streamlining the legal process and expediting the departure of criminal aliens from the United States.

2. In an effort to identify criminal aliens who were not identified by the INS during their incarceration and therefore were beyond the ability of the INS to process through the IHP, H.R. 3634 has been introduced to amend Section 263(a) of the Immigration and Nationality Act [8 U.S.C. 1303]. This legislation would require aliens who have been convicted of any crime and released on parole or probation, and who may still be unknown to the INS, as a condition of their release, to register with the Attorney General. Under this proposed legislation, failure to register would render the alien deportable and subject to a $1,000 fine.

3. In a similar vein, the Department continues to recommend that Section 212(c) of the Immigration and Nationality Act be amended to bar discretionary relief to an aggravated felon who has been *sentenced* to a term of more than 5 years. The current statute bars discretionary

relief to an alien who "has *served* a term of imprisonment of at least 5 years."

4. The Department also recommends an amendment to Section 243(c) and (d) of the Immigration and Nationality Act [8 U.S.C. 1253] to permit the attachment of personal assets of any alien who fails, without good cause, to surrender for deportation at the appointed place and time. The funds collected would be used to reimburse INS' appropriated funds expended for the costs of locating, apprehending, administering the deportation, and travel costs associated with the deportation of aliens who are unable to pay the costs of deportations, or where the aliens have no attachable assets that could be used to reimburse costs to the government.

5. The Department also intends to seek legislative authorization to require payment of a new filing fee when an alien under voluntary departure (in lieu of formal deportation) applies for an extension of the voluntary departure period. Generated receipts would be payable to the INS for use in locating, apprehending and removing aliens who abscond during the administrative hearing process.

6. The Department recommends an amendment to section 244(a) of the Immigration and Nationality Act to render an alien convicted of an aggravated felony ineligible for relief pursuant to this section of the law. Presently section 244(a) suspends deportation of convicted aggravated felons who have established 10 years of physical presence in the United States, and for whom removal would cause hardship to family members in the United States. The purpose of this amendment is to deny to

convicted aggravated felons this form of discretionary relief from deportation.

7. The Department also recommends an amendment to section 212(h) of the Immigration and Nationality Act to bar convicted aggravated felons from seeking the waiver for exclusion and deportation based on hardship, provided for in that section. Presently Section 212(h) of the Immigration and Nationality Act waives certain criminal grounds of exclusion for an alien who is the spouse, parent, son or daughter of a United States citizen or lawful resident of the United States, if the exclusion would result in extreme hardship to the relative. The amendment would deny this form of discretionary relief to convicted aggravated felons in the United States.

8. Finally the Department recommends that sections 245 and 249 of the Immigration and Nationality Act bar aggravated felons from relief from deportation or other benefits provided for in these section. The amendment to section 245 prohibits a convicted aggravated felon from adjusting status in the United States. Consequently a convicted felon could not adjust his status from a nonimmigrant alien to that of an alien lawfully admitted for permanent residence. For an alien who entered the United States prior to January 1, 1972, the amendment to section 249 would bar a convicted aggravated felon from registering his/her admission for lawful residency.

– CRIMINAL ALIEN CENSUS –

SECTION 510(a)(b)(1)

NUMBER OF ALIENS IN THE UNITED STATES WHO HAVE BEEN CONVICTED OF A CRIMINAL OFFENSE IN THE UNITED STATES AND, OF SUCH NUMBER, THE NUMBER OF SUCH ALIENS WHO ARE NOT LAWFULLY ADMITTED TO THE UNITED STATES.

NUMBER OF ALIENS CONVICTED OF CRIMINAL OFFENSES WHO HAVE BEEN ARRESTED BY INS*

	TOTAL NO. OF ALIENS CONVICTED	NOT LAWFULLY ADMITTED (AGGRAVATED FELONS)	NOT LAWFULLY ADMITTED (OTHER THAN AGGRAVATED FELONS)
FY 90	57,922	34,616	10,539
FY 91	58,323	33,221	10,619

* These numbers were obtained from the G-875 – Criminal Alien Report, reported monthly by the Investigations Division and Border Patrol Stations.

SECTION 510(a)(b)(2)

NUMBER OF ALIENS LAWFULLY ADMITTED TO THE UNITED STATES WHO HAVE BEEN CONVICTED OF SUCH AN OFFENSE AND, BASED ON SUCH CONVICTION, ARE SUBJECT TO DEPORTATION FROM THE UNITED STATES.

NUMBER OF LAWFULLY ADMITTED ALIENS CONVICTED AND SUBJECT TO DEPORTATION*

	LAWFULLY ADMITTED ALIENS DEPORTABLE (AGGRAVATED FELONS)	LAWFULLY ADMITTED ALIENS DEPORTABLE (OTHER THAN AGGRAVATED FELONS)
FY 90	11,601	1,166
FY 91	13,215	1,268

* This information was obtained from the G-875 – Criminal Alien Report – which lists total number of aggravated felonies and total number of misdemeanors committed by a lawfully admitted alien.

SECTION 510(a)(b)(3)

THE NUMBER OF ALIENS IN THE UNITED STATES WHO ARE INCARCERATED IN A PENAL INSTITUTION IN THE UNITED STATES, AND, OF SUCH NUMBER, THE NUMBER OF SUCH ALIENS WHO ARE NOT LAWFULLY ADMITTED TO THE UNITED STATES.

NUMBER OF ALIENS INCARCERATED IN A PENAL INSTITUTION IN THE US*

	TOTAL INMATE POPULATION	FOREIGN BORN	DATE
Federal	64,131	16,060	October 1, 1991
State	707,212	41,184	September 1991 (Average daily population)
Local Jails**	**	**	
Probation/ Parole**	**	**	

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* These totals represent inmates who have listed a foreign place of birth. Characterization as foreign born may include persons who have gained citizenship status, and does not distinguish between legal or illegal status at time of entry into the United States.

** Responses to 5,790 questionnaires continue to be received and consolidated. The total number of foreign born individuals housed in local jails or supervised in the community is being tabulated as responses are received.

Other efforts to obtain the requested statistics included a request for assistance from the Federal Bureau of Investigation Identification Division (ID). The INS requested statistical information on arrest records listing a place of birth other than the United States. The Federal Bureau of Investigations advised that ID files are not indexed by place of birth; therefore, extensive computer time would be required to obtain statistical information on all arrests. The ID, however, was able to provide the INS with the following statistics:

As of June 30, 1991 ID records show the following:

- 23,533,130 names contained in automated files.
- 3,993,177 names listing a place of birth other than the United States.
- Records listing a place of birth other than the United States represent 16.99 percent of total.

SECTION 510(a)(b)(4)(A)

THE NUMBER OF ALIENS WHOSE DEPORTATION HEARINGS HAVE BEEN CONDUCTED PURSUANT TO SECTION 242A(a) OF THE IMMIGRATION AND NATIONALITY ACT.

DEPORTATION HEARINGS CONDUCTED THROUGH INSTITUTIONAL HEARING PROGRAM*

11,648**

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* During FYs 1989, 1990 and 1991, a total of 11,648 criminal aliens were granted expedited hearings under Section 242A(a).

** This information was furnished by the Executive Office for Immigration Review. Data includes deportation and exclusion hearings.

SECTION 510(a)(b)(4)(B)

THE PERCENTAGE THAT SUCH NUMBER REPRESENTS OF THE TOTAL NUMBER OF DEPORTABLE ALIENS WITH RESPECT TO WHOM A HEARING UNDER SUCH SECTION COULD HAVE BEEN CONDUCTED SINCE NOVEMBER 18, 1988.

PERCENT THE ABOVE NUMBER REPRESENTS OF THE TOTAL NUMBER OF HEARINGS WHICH COULD HAVE BEEN CONDUCTED*

61%

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* The exact percentage cannot be calculated due to the lack of uniform reporting procedures necessary to gather such information from criminal justice agencies. The current INS census estimates that there are 57,051 foreign born inmates in the Federal and state correctional facilities. It is impossible to establish an exact correlation between this population and the known number of criminal aliens granted expedited hearings under Section 242A(a). However, past experience shows that approximately one-third of the foreign born inmate population against whom INS detainers have been placed represents aliens eligible for action under 242A(a).

SECTION 510(a)(b)(5)

THE NUMBER OF ALIENS IN THE UNITED STATES WHO HAVE REENTERED THE UNITED STATES AFTER HAVING BEEN CONVICTED OF A CRIMINAL OFFENSE IN THE UNITED STATES.

NUMBER OF ALIENS IN THE UNITED STATES WHO HAVE REENTERED AFTER HAVING BEEN CONVICTED OF A CRIMINAL OFFENSE IN THE UNITED STATES

TOTAL NO. OF ALIENS WHO HAVE REENTERED U.S. AFTER HAVING BEEN CONVICTED	AGGRAVATED FELONS	OTHER THAN AGGRAVATED FELONS
461*	**	**

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* This number represents aliens encountered and arrested by the INS who have been previously deported from the United States because of a prior criminal conviction.

** The FY 91 data base does not show whether or not the crimes committed were aggravated felonies. A system that will capture this information is currently being studied with the development of the National Enforcement Operations Support Center.

– CRIMINAL ALIEN REMOVAL PLAN –

The IHP program allows the INS to initiate proceedings against criminal aliens while these criminal aliens are serving sentences for the crimes they have committed. Once these prisoners are identified, the INS immediately notifies the alien's country of origin and begins the process of securing the necessary travel identity documents to allow the INS eventually to deport the alien.

Every alien found deportable must have a valid travel document before actual removal from the United States can take place. A formal written request is made to the appropriate foreign embassy in every case where the alien does not possess a valid document. In many instances a personal appearance by the alien before the alien's governmental representative in the United States is necessary to satisfy the foreign country to which he/she is being returned that the alien is, in fact, a native and citizen of that country.

The INS moves quickly to ensure that undue delays do not occur when attempting to secure travel documents for deportations from the United States. If a pattern of delay by a particular country in documented, the Attorney General, pursuant to Section 243(g) of the Immigration and Nationality Act [8 U.S.C. 1253(g)], can request the Secretary of State to impose sanctions on the non-complying country. The INS is exploring the possibility of expanding these sanctions, which now pertain only to immigrants, to non-immigrants as well. This remedial action would provide a powerful incentive to other countries to discharge their international responsibilities in a timely manner.

The IHP approach allows the INS to begin the process of securing a travel document for a criminal alien who has been identified. The gradual expansion of the IHP trough state penal systems will allow the INS to make preliminary travel arrangements, during their period of incarceration, for criminal aliens to travel to their home countries.

The INS uses its finite transportation resources, land and air, to the maximum extent possible. The INS operates its own aircraft to expedite the transfer of groups of aliens to the departure point in the United States nearest to the foreign country of destination. The INS also has arrangements with various state Air National Guard Units for transferring groups of aliens within the United States to augment its own limited air transport capability.

The IHP and the gradual expansion of this process into Oakdale and the INS' Service Processing Center in San Pedro, California, will continue to facilitate the expeditious removal of criminal aliens from this country through centralization of alien inmate populations.

Currently, criminal aliens remain in INS custody for an average of 17 days at an average cost of $37.28 per day. With the gradual expansion of the IHP through state correctional systems, and the resulting centralization, the INS expects to reduce substantially its detention costs by decreasing the time a criminal alien remains in INS custody prior to deportation from the country.

A concern for the safety of the traveling public requires the INS to review carefully the past criminal history and behavior of each alien deportee and determine whether or not the alien needs to be escorted by the INS while traveling aboard a commercial aircraft. The determination

whether or not to escort an alien is a significant budget consideration. The INS estimates that 50 percent of detained criminal aliens facing deportation will require a physical escort by two INS officers.

For FY 1992, the INS estimates that it will deport 17,000 criminal aliens from the United States. The cost of removal of these criminal aliens, including transportation and escort costs, will be approximately $11.7 million. Present appropriations provide for $6 million of this cost by an additional $5.7 million is needed to accomplish this stated goal. Additionally, the Department has estimated that it would cost $3.7 – 4 million per year to operate the National Enforcement Operation Support Center, an enforcement mechanism designed to facilitate the early identification, tracking, and prompt removal of criminal aliens from the United States. As mentioned above, the Department's FY 1993 budget includes $1.5 million to establish the center.

IDENTIFICATION AND PREVENTION OF REENTRY AFTER DEPORTATION

The process of identifying aliens who attempt to reenter the United States after deportation, or to identify those who have already reentered, is extremely difficult, due to the great number of persons seeking to enter the United States legally and illegally. The INS has in place a system that contains names and biographical data concerning criminal aliens who have been deported from the United States known as the National Automated Immigration Lookout System (NAILS). The NAILS can be accessed by immigration officers at all Ports of Entry, and at INS

offices throughout the country. Information in this system is also available to United States' Consular Officers abroad, who screen applicants applying for visas at foreign consulate locations to detect criminal records. However, not all aliens are checked through this system again because of the great number of persons seeking entry into the United States legally or illegally. The system is employed by INS and Consular Officers who physically encounter suspect aliens.

Names, physical data, and fingerprints of each criminal alien located and deported from the United States are maintained in computerized files by both the FBI and the INS. This data is accessible to immigration officers and other law enforcement officers, if an alien comes to their attention after being encountered in the United States.

The INS continues to rely on criminal prosecution of the alien for reentry after deportation to deter the reentry of criminal aliens who seek to return to this country. The penalties for such reentry have been enhanced by IMMACT 90, underscoring the importance Congress attaches to preventing criminal aliens from reentering the United states.

– CONCLUSION –

Under the umbrella of new laws, the Department is making a concerted effort to respond to the magnitude of the criminal alien problem. The problem is large and complex, due to the sheer number of criminal aliens who are intermingled in general prison populations in numerous criminal justice systems, both Federal and state. The INS survey data collected during October 1991 indicates that

the Federal prison system housed 16,060 foreign born inmates; and the state prison system 41,184 foreign born inmates, many of whom are criminal aliens eligible for deportation. Once identified by the INS, and based on a determination of their immigration status, those eligible for deportation must be placed under administrative proceedings for removal.

The initiatives enumerated in this report represent a comprehensive approach by the INS to address the problem of aliens involved in criminal activity many of whom have already been convicted of serious crimes and are serving sentences in widely dispersed correctional institutions throughout the United States. The INS is working diligently to improve its methods of identification, tracking and removal, within present resource limitations, and is determined to meet the challenge of dealing with criminal aliens, through added resources, new technology, innovative enforcement strategies and legislative remedies.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530
MAY 31, 1991

The Honorable Edward M. Kennedy
Chairman
Subcommittee on Immigration and
Refugee Affairs
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to section 545(c) of the Immigration Act of 1990, Pub. L. 101-649, the Attorney General is required to report on perceived abuses associated with the failure of aliens to consolidate requests for discretionary relief before Immigration Judges at the first hearing on the merits. Enclosed is that report.

The conclusion of the report is that there is no evidence of a pattern of abuse by aliens in failing to consolidate their applications for discretionary relief. The current law, regulations, and sound discretion of Immigration Judges serves as an effective deterrent to such types of abuse.

We will continue to monitor the issue, and if abuses occur, stand ready to implement further restrictions if the situation warrants.

Sincerely,

/s/ W. Lee Rawls
W. Lee Rawls
Assistant Attorney General

Enclosure

ATTORNEY GENERAL'S REPORT TO CONGRESS ON CONSOLIDATION OF REQUESTS FOR RELIEF FROM DEPORTATION

Introduction:

Section 545(c) of the Immigration Act of 1990 mandates that the Attorney General submit a report to Congress on perceived abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits. The Department has examined its current procedures to determine what safeguards, if any, exist to guard against the possibility of aliens abusing the hearing process by not consolidating their requests for relief. The Department has also examined statistical information which defines the possible parameters of the problem when compared against the entire case load. Finally, the Department has surveyed a cross section of immigration judges to determine whether or not abuses of he kind stated in section 545(c) are widespread and significant.

The Department's conclusion is that there is no pattern of abuse by aliens who fail to consolidate their applications for relief. Current procedures, regulations, and case law contain restrictions to guard against such abuses. Also, an examination of statistical information establishes that the number of cases in which multiple applications are filed and the number of cases in which motions to reopen are filed constitute an extremely low percentage of the total case load. Finally, and perhaps most persuasively, an informal survey of a cross section of immigration judges, those who deal with the deportation cases day-to-day, indicates that there is no evidence

of aliens abusing the system by failing to consolidate the filing of applications for relief.

Current Law and Procedure:

Current law and procedure strongly discourage the piecemeal filing of applications for relief and safeguard against abuse. The consolidation of filing for relief of deportation is mandatory under current law.

At the initial deportation proceeding before an immigration judge, typically a master calendar call, deportability is conceded and the immigration judge inquires as to what relief will be sought by the respondent. The respondent, often through counsel, indicates what relief will be sought and is granted time to file the appropriate applications. In the typical case, the applications are subsequently filed and an individual merits hearing is held in which *all* applications are considered by the immigration judge. At the end of the merits hearing, the immigration judge makes a decision on all forms of relief. Appeal rights are available to the Board of Immigration Appeals (BIA).

Applications for relief which are made subsequent to a hearing must be made in conjunction with a motion to reopen. The motion to reopen, in order to be successful, must meet stringent requirements of 8 C.F.R. 3.2 and 3.8 (relating to the BIA) or 8 C.F.R. 3.22 and 8 C.F.R. 242.22 (relating to immigration judges). These sections read together clearly provide that motions to reopen must, among other things, present new evidence which was not available at the prior proceedings. These regulatory requirements assure that a motion to reopen will not be

granted unless the evidence was not available previously. Therefore, the abuses described in section 545(c) are largely eliminated. In addition, current case law undergirds the regulations by stressing that new evidence as well as a prima facie case and a favorable case on discretion must all be presented before a motion to reopen is granted. See *Matter of Barrera,* 19 I&N Dec. 837 (BIA 1989); *Matter of Sipus,* 14 I&N Dec. 229 (BIA 1972); *Matter of Lam,* 14 I&N Dec. 98 (BIA 1972); also see, *INS v. Wang,* 450 U.S. 139 (1981). All of these requirements in current law provide ample protection against the abuses of not consolidating applications for relief as envisioned in section 545(c).

Under current law, it should also be noted that a stay of deportation is not automatic upon the filing of a motion to reopen. See 8 C.F.R. 3.6, 3.8, and 8 C.F.R. 242.22. Therefore, if an alien were to file an abusive, unmeritorious motion to reopen, attempting to file for relief that should have been applied for at an earlier hearing, there is no reason why that alien cannot be deported immediately absent the granting of a stay by the immigration judge or the BIA. In sum, the current law constitutes a strong disincentive for piecemeal filing of motions for relief and creates a strong incentive for consolidating filings.

Statistical Examination:

An examination of the total number of cases in which multiple applications and motions to reopen were filed,[1] compared to the total number of cases, clearly establishes a low possibility of abuse, as illustrated by the following statistics:

FY	TOTAL DEPORTATION COMPLETIONS	DEPORT, COMPLETIONS W/MULTIPLE APPLICATIONS	MOTIONS TO REOPEN
88	78,711	877	2,081
89	102,479	723	2,142
90	106,150	932	2,474
91[2]	60,782	733	1,531

As can be seen from the statistical information, the total number of cases that could possibly contain the abuses described in section 545(c) are less than five percent of the total. In fact, due to safeguards in current law, and as confirmed by our immigration judges (see below), even in this limited number of cases there is an absence of abuse.

The EOIR computerized information system tracks the applications for relief filed in each deportation case, but does not indicate when each application was filed. The statistical information presented shows all cases in which multiple applications were filed, but not whether

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[1] These statistics exclude voluntary departure which is a minimal routine relief from deportation which is almost always requested as an alternate to other more substantive reliefs.

[2] Based on six months of data.

they were filed together or in series. We know from surveying Immigration Judges, however, that in the majority of cases, the multiple applications are submitted at the same time. This further confirms the absence of a pattern of abuse by aliens regarding the submission of applications for relief from deportation.

Immigration Judges Survey:

An informal survey of the Immigration Judge Advisory Committee was conducted in April, 1991. This committee consists of a cross section of immigration judges from eight cities. These immigration judges are highly regarded for their experience and knowledge and are called upon by the Chief Immigration Judge to advise him in matters affecting the immigration adjudication process nationwide.

The immigration judges surveyed unanimously concluded that there was no pattern of abuse associated with aliens not consolidating their applications for relief. They felt that the current case law, regulations and immigration judges' sound discretion were adequate to discourage and basically eliminate the possibility of abuse that might be caused by an alien filing applications piecemeal in an effort to delay deportation. They had simply not experienced a problem in this area.

The immigration judges indicated that those who file subsequent applications for relief do so mainly based on alleged changed circumstances and new evidence. They stressed that motions to reopen are scrutinized to determine if the evidence in the motion is new and was not available at the prior proceeding. If the application could

have been presented previously, that motion would be generally denied. They also stressed that since there is no automatic stay on motions to reopen, the Immigration and Naturalization Service is free to deport an individual while a motion is pending, absent a specific grant of a stay of deportation.

Conclusion:

Based on a review of the current law, statistical information, and a survey of immigration judges, the Department concludes that there is no pattern of abuse by aliens because of their failure to consolidate requests for relief from deportation before immigration judges. The total number of multiple applications in cases and motions to reopen is relatively low, and the majority of subsequent applications are based upon an allegation of new facts, which is required by the regulations before an alien's case may be reopened.

Because there is no evidence of the type of abuse cited in section 545(c), the Department is of the opinion that current law is sufficient to guard against future problems in this area. We will, of course, continue to monitor this issue and stand ready to implement new restrictions, if the situation warrants.

Supreme Court, U.S.
FILED
FEB 11 1993

No. 92-872

In the Supreme Court of the United States

OCTOBER TERM, 1992

IBRAHIM FEZ GHASSAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT KENDALL, JR.
ANTHONY W. NORWOOD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an individual who has been found deportable by a final order of the Board of Immigration Appeals (BIA) remains eligible to file a motion to reopen his deportation proceedings to seek relief from deportation under 8 U.S.C. 1182(c), even though that relief is only available to permanent resident aliens and an individual found deportable is no longer a permanent resident alien.

2. Whether the BIA abused its discretion in discounting petitioner's reliance on his marriage as an equitable factor supporting relief from deportation based on the fact that petitioner became married after the deportation proceedings were instituted.

3. Whether the BIA properly rejected the finding of the immigration judge that petitioner had rehabilitated himself.

4. Whether the court of appeals properly reviewed the decision of the BIA for abuse of discretion.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-49) is reported at 972 F.2d 631. The decisions of the Board of Immigration Appeals (Pet. App. 5-22, 23-33) and the immigration judge (Pet. App. 1-4) are unreported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 50-51, 52-53) were entered on September 8, 1992. A petition for rehearing was denied on October 8, 1992. Pet. App. 54-55. The petition for a writ of certiorari was filed on November 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Lebanese national who came to the United States in 1978 to attend college. In 1981 he became a permanent resident alien. In 1984 he pleaded guilty to charges of conspiracy to import and distribute heroin, in violation of 21 U.S.C. 841(a), arising out of a heroin conspiracy organized by his brother. He was sentenced to eight years in prison and a $25,000 fine. Petitioner was released from prison to the custody of the Immigration and Naturalization Service (INS) in 1989. In March 1989, INS instituted deportation proceedings under 8 U.S.C. 1251(a)(11) (1988).[1] Subsequently, in September 1989, petitioner married Donna Owings, a United States citizen. Pet. App. 6, 9-10, 35.

2. The immigration judge held petitioner deportable. Pet. App. 1-4. Before the immigration judge, petitioner admitted his deportability, *id.* at 1, but sought discretionary relief under 8 U.S.C. 1182(c), which authorizes the Attorney General to grant certain discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a lawful unrelinquished domicile [in the United States] of seven consecutive years."[2] The

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[1] The grounds of deportation were reorganized by Section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077-5081, and that provision now appears as 8 U.S.C. 1251(a)(2)(B)(i) (Supp. II 1990). The amendment does not apply to petitioner because the Act states that the amendments set forth in Section 602 "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." Section 602(d), 104 Stat. 5082.

[2] Although the statute on its face authorizes the Attorney General only to admit aliens returning to such a domicile, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir.

immigration judge denied the application for relief from deportation, explaining that although petitioner had "show[n] genuine rehabilitation, * * * the nature and seriousness of his offense outweighs these equities," emphasizing the fact that petitioner "was well-educated and employed during his criminal involvement." Pet. App. 3.

3. The BIA affirmed. Pet. App. 5-22. The BIA noted its settled rule "that an alien who has engaged in serious criminal misconduct must show unusual or outstanding equities before discretion may be exercised in the alien's favor." *Id.* at 16-17 (internal quotation marks omitted). Because the BIA agreed with the immigration judge that petitioner's conduct was serious, petitioner's case was covered by that rule. *Id.* at 20-21. In response to petitioner's claim that the immigration judge erred in not granting him relief even though the judge believed petitioner had rehabilitated himself, the BIA concluded that it was "unconvinced as to [petitioner's] rehabilitation." *Id.* at 21. It explained that petitioner

> took part in an elaborate criminal conspiracy despite the obvious consequences if he should be discovered and despite the pernicious nature of the activity in which he was engaged. We are not persuaded by [petitioner's] good behavior since his conviction that he will not succumb again to his family's pressure and the temptation of the large profits to be had in such activities.

Ibid. Turning to the factors in petitioner's favor, the BIA noted that petitioner's marriage, coupled with the inability of his family to travel to Lebanon, raised some

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1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also *id.* at 32 (Appleman, concurring) (noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

equities in his favor, but found that the weight of that factor was "diminished because [petitioner] and his wife married after deportation proceedings were instituted, and with full knowledge that he might be deported." *Id.* at 22. Accordingly, the court concluded that "the equities presented" did not justify the relief sought by petitioner. *Ibid.*

4. Petitioner then filed a motion to reopen the proceedings to introduce new evidence to support his request for relief under Section 1182(c), as well as a motion to reconsider. The BIA denied both motions. Pet. App. 23-33. The BIA first addressed the motion to reopen and explained that its earlier order had finally determined petitioner's deportability, thus depriving him of lawful permanent resident status. Because he no longer was a lawful permanent resident, he no longer was eligible for relief under Section 1182(c), and thus could not reopen the proceedings to obtain that relief; the BIA relied heavily on its recent decision in *In re Cerna*, Interim Dec. No. 3161 (Oct. 7, 1991). Pet. App. 24-27.

The BIA then addressed petitioner's motion to reconsider. Pet. App. 27-33. First, the BIA rejected petitioner's claim that it had erred in engaging in de novo review of the immigration judge's evaluation of petitioner's claim of rehabilitation, and reiterated its finding that petitioner had failed to demonstrate rehabilitation. *Id.* at 27. In any event, the BIA concluded, the serious nature of petitioner's crime would have made it inappropriate to grant relief "even if we were persuaded of [petitioner's] rehabilitation." *Id.* at 29. The BIA also rejected petitioner contentions that it should reconsider its evaluation of the equities, *id.* at 30, that it should consider whether the equities had changed during the course of the administrative proceedings, *id.* at 30-31, and that it should consider new evidence, *id.* at 31-32. As for the new evidence, the BIA noted that its review "is a

review of the record before the immigration judge," and thus that it does not consider new evidence except to the extent necessary to determine whether the matter should be remanded to the immigration judge. The BIA explained that the new evidence—which related to petitioner's alleged rehabilitation and to a miscarriage petitioner's wife had suffered—would not have been sufficient to justify remanding the matter to the immigration judge. *Id.* at 32.

5. Petitioner filed petitions for review of the underlying decision and the denial of the motion to reconsider. The court of appeals consolidated the two matters and denied the petitions. Pet. App. 34-49. First, the court reiterated its view that it reviews BIA decisions on applications for relief from deportation under Section 1182(c) only for abuse of discretion. Pet. App. 39 (quoting *Diaz-Resendez* v. *INS*, 960 F.2d 493, 495 (5th Cir. 1992)). Applying that rule, it affirmed the BIA's denial of petitioner's application for relief from deportation. The court rejected petitioner's contention that it was irrelevant that his wife's hardship was diminished by her knowledge of his possible deportation, explaining that "[c]onsidering his wife's previous knowledge seems eminently equitable." Pet. App. 40. The court also rejected petitioner's contention that the BIA failed to consider all of the relevant evidence, stating that "the BIA did consider all of [petitioner's] evidence—it just did not find it compelling." *Ibid.* It then rejected petitioner's contention that the BIA erred in finding that he was not rehabilitated. The court noted that the BIA, unlike the courts of appeals, is not a court of error and thus is free to review the record de novo. *Id.* at 40-41. The court also concluded that the BIA's opinion reflected an adequate basis for its view that petitioner was not rehabilitated, principally because petitioner "has not established that his brother will be unable to entice him into another

criminal scheme" and had failed to present evidence that petitioner "has become immune to his brother's blandishments or has broken off contact with him." *Id.* at 42.[3]

The court also affirmed the BIA's denial of petitioner's motion to reopen. Pet. App. 44-47. The court agreed with the BIA that petitioner was not eligible for reopening to seek relief from deportation under Section 1182(c), because petitioner was not eligible for that relief at the time he filed the motion to reopen. Pet. App. 46-47. Finally, the court affirmed the BIA's denial of petitioner's motion to reconsider, concluding that it did "not believe that the BIA abused its discretion in rejecting the motion." *Id.* at 49.

ARGUMENT

1. Petitioner first argues (Pet. 14-15, 17-20) that the BIA erred in denying his motion to reopen the deportation proceedings on the ground that he was ineligible for the relief he sought at the time he filed the motion to reopen. As this Court has explained, an alien seeking to reopen deportation proceedings must make a prima facie showing that he is eligible for the relief he seeks. *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). To be eligible for relief under 8 U.S.C. 1182(c), an alien must, among other things, be a lawful permanent resident alien. Under 8 U.S.C. 1101(a)(20), an alien is "lawfully admitted for permanent residence" if he has "the status of having been lawfully accorded the privilege of residing permanently in the United States * * *, such status not having changed."

Hence, the question in this case is whether petitioner's status as a lawful permanent resident alien

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[3] Petitioner testified before the immigration judge that "he unwittingly became involved in [the criminal conspiracy]" and "did not know the nature of his brother's activities until [he was arrested]." Pet. App. 10.

"changed," for purposes of 8 U.S.C. 1101(a)(20), at the time the BIA issued a final order of deportation. In light of the statutory mandate that such decisions "shall be final" upon completion of administrative proceedings, see 8 U.S.C. 1252(b); 8 C.F.R. 243.1 ("an order of deportation * * * shall become final upon dismissal of an appeal by the [BIA]"), the BIA consistently has held that an individual's status changes at that time and that he thus is not thereafter eligible to seek relief dependent on that status. See *In re Cerna*, Interim Dec. No. 3161 (BIA Oct. 7, 1991), aff'd, *Cerna* v. *INS*, 979 F.2d 212 and 979 F.2d 213 (11th Cir. 1992) (Table) (per curiam); see also *Gonzales* v. *INS*, 921 F.2d 236, 238-239 (9th Cir. 1990) (similar analysis). Because a motion to reopen is, in the BIA's view, a request for a new decision based on arguments not before the original tribunal, the BIA has concluded that individuals for whom it has issued a final order of deportation should not be able to reopen their deportation proceedings to secure relief from deportation based on Section 1182(c). *Cerna*, Interim Dec. No. 3161, slip op. 6.[4]

Petitioner correctly notes (Pet. 14) that the Second Circuit in *Vargas* v. *INS*, 938 F.2d 358 (1991), overturned a BIA decision denying a motion to reopen in similar circumstances. *Id.* at 360-364. The court in that case, however, relied on the absence from the BIA opinion of any "mention of statutory or regulatory provisions," *id.* at 360. Because the opinion had no analytical basis, the court concluded that it "effectively amend[ed] an existing regulation without notice or opportunity for com-

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[4] As the BIA concluded in *Cerna*, this rule does permit aliens to file motions to reconsider, because such a motion does not seek a new decision based on new arguments, but instead seeks to convince the tribunal that it erred in resolving the matters placed before it originally. See *Cerna*, Interim Dec. No. 3161, slip. op. 5-6.

ment." *Id.* at 361. The court declined to consider INS's attempt to justify the decision under the governing statutes and regulations, characterizing those matters as "[p]ost hoc explanations * * * offered by appellate counsel [which] are * * * an inadequate basis for the exercise of substantive review of an administrative decision." *Id.* at 363.[5] Those criticisms do not apply to the decision under review, because, in response to the decision in *Vargas*, the BIA gave the matter plenary consideration in *Cerna* and issued a lengthy opinion explaining the basis for its decision. The Second Circuit has not had an opportunity to consider its position in light of *Cerna*. Accordingly, the matter is not ripe for consideration by the Court at this time.[6] Futhermore, because the seriousness of petitioner's drug trafficking offenses makes it most unlikely that the result in this case would change even if the matter were reopened, this case would

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[5] The only substantive comment made by the *Vargas* panel was its suggestion that the BIA's decision was "deeply puzzling" because "[a] motion to reopen or to reconsider is not a request for a *new* decision." 938 F.2d at 362. As noted above, the BIA's decision in *Cerna* rests on the view that a motion to reopen *is* a request for a new decision. See *Cerna*, Interim Dec. No. 3161, slip. op. 6 (motion to reopen "seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered").

[6] Moreover, pursuant to Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5066, the Attorney General is in the process of promulgating regulations that would delineate more precisely the circumstances under which motions to reopen would be permissible. In connection with that process, the Attorney General is considering whether to adopt a regulation addressing the question presented here. Because such a regulation would alter the legal issues presented by the petition—whatever view the regulation adopts—that is a further consideration counseling against review by the Court at this time.

not be a suitable vehicle even if the Court were inclined to consider the question at this time.

2. Petitioner next contends (Pet. 15-16, 20-21) that the court of appeals erred in allowing the BIA to take account of the fact that petitioner's wife married him after deportation proceedings had been instituted against petitioner. As the court of appeals recognized, there is nothing unusual or untoward about considering that fact. Petitioner is subject to deportation because he committed serious drug offenses while here as a resident alien. In substance, petitioner contends that he should be immune from deportation because of the hardship the deportation will cause his wife. The fact that his wife married him years after his conviction made him deportable—indeed after the deportation proceedings already had been instituted—certainly justifies a treatment of his case different from the treatment that might be accorded a case where an innocent spouse had been married to the individual during an extended period of lawful permanent residence. Petitioner cites no decision of any court or administrative body supporting his criticism of the BIA's approach. Accordingly, in light of the deference due the BIA's evaluation of the relevant factors, the petition offers nothing to suggest that the claim merits review in this Court.

3. Petitioner also argues (Pet. 16, 21-22) that the BIA erred in determining that he had not established rehabilitation. He acknowledges that the BIA "regularly proclaims its 'de novo' review power over IJ findings," Pet. 16, and does not argue that a more deferential standard is generally appropriate, but simply that this case presented an issue of credibility as to which more deference was appropriate. Pet. 16, 21-22. He does not address the court of appeals' conclusion (Pet. App. 41 n.6) that findings of rehabilitation "require consideration of evidence extrinsic to that presented by the subject witness" and

thus do not turn solely upon the credibility of witnesses. Again, petitioner cites no authority in support of his claim of error. Moreover, as both the BIA and the court of appeals noted (*id.* at 29, 43), petitioner would not have been entitled to relief even if he had rehabilitated himself. In those circumstances, the BIA's evaluation of the evidence of petitioner's rehabilitation presents no occasion for review by this Court.

4. Finally, petitioner argues (Pet. 16-17, 22-27) that the court of appeals applied the abuse of discretion standard in an unduly deferential manner, and that various panels of the Fifth Circuit have applied that standard in different ways in reviewing BIA decisions denying suspension of deportation. Petitioner acknowledges that application of the abuse of discretion standard is appropriate and that this Court has "held that judicial review is particularly limited" in various immigration contexts. Pet. 23. Petitioner's argument is simply that the standard should have been applied with less deference in this case, because it involves relief sought by a permanent resident alien. Pet. 23-24. Again, petitioner cites no authority for that argument. In any event, the argument has no basis in 8 U.S.C. 1105a(a), which establishes a single framework for review of all challenges to "final orders of deportation."[7] Moreover, the seriousness of petitioner's drug trafficking offenses makes it most unlikely that the court of appeals would have overturned

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[7] Petitioner supports his argument by selected quotations from other decisions of the Fifth Circuit applying the abuse-of-discretion standard, primarily *Diaz-Resendez* v. *INS*, 960 F.2d 493 (1992), the decision the court of appeals stated it was following in this case, Pet. App. 39. Any tension between other decisions of the Fifth Circuit and the panel decision in this case can be resolved by the court of appeals. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

the BIA's decision under any standard. Accordingly, there is no need for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT KENDALL, JR.
ANTHONY W. NORWOOD
Attorneys

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONER

THOMAS P. ADAMS
419 Gravier Street
New Orleans, Louisiana 70130
Telephone (504) 523-3803
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF OF PETITIONER

In its brief in opposition, Respondent fails to rebut, or in many cases even to address, the arguments advanced by Petitioner. Respondent also seeks to mislead this Court, in claiming that the Attorney General "is considering" adopting a regulation that would resolve the split in the circuits over the holding of the Board of Immigration Appeals in *Matter of Cerna*, Interim Dec. No. 3161 (BIA 1991) (*see* Br. Opp. at 8 n.6).

This claim is purely speculative, and therefore without merit. It seems unlikely, in any event, that the future course of the Attorney General's office in immigration matters can be predicted, given the recent change of

administrations and the vacancy in the Immigration and Naturalization Service Commissioner's office. Indeed, Respondent's brief was probably written when the Attorney General position itself was vacant.

Respondent states that the alleged planned regulation arises from Section 545(d) of the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 5066, which directs the Attorney General to issue regulations governing permissible timing and number of motions to reopen deportation proceedings (Br. Opp. at 8 n.6). There appears little reason to change the status quo in promulgating such regulations, however, since in a report to Congress mandated by IMMACT Sect. 545(c) (which is reproduced, along with a cover letter, at pages App. 92 to App. 98 of Petitioner's certiorari petition), the Attorney General found no abuse of motions to reopen by aliens, and no need for restrictive measures governing such motions. U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S REPORT TO CONGRESS ON CONSOLIDATION OF REQUESTS FOR RELIEF FROM DEPORTATION (undated; cover letter dated May 31, 1991).

IMMACT Sect. 545(d) cannot serve as the basis for a regulation addressing the *Cerna* issue, in any event. The statute, in its entirety, reads as follows:

> (d) Regulations on Motions to Reopen and To Reconsider and on Administrative Appeals. – Within 6 months after the date of the enactment of this Act, the Attorney General shall issue regulations with respect to –
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> (1) the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such

motions that may be filed and a maximum time period for the filing of such motions; and

(2) the time period for the filing of administrative appeals in deportation proceedings and for the filing of appellate and reply briefs, which regulations include a limitation on the number of administrative appeals that may be made, a maximum time period for the filing of such motions and briefs, the items to be included in the notice of appeal, and the consolidation of motions to reopen or to reconsider with the appeal of the order of deportation.

This language in no way implicates *Cerna*. The alleged proposed regulation would be ultra vires and hence invalid, under the circumstances. *U.S. v. Larionoff*, 431 U.S. 864, 873 (1977).

The petition should be granted.

THOMAS P. ADAMS
419 Gravier Street
New Orleans, Louisiana 70130
Telephone (504) 523-3803

Attorney of Record for Petitioner
Ibrahim Fez Ghassan